Supreme Court, U.S.
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92-443

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

James M. Elfelt, Joseph P. Elfelt
Anthony J. Elfelt, Lawrence W. Elfelt,
Paul G. Elfelt, David C. Elfelt
and Steven M. Elfelt,

Petitioners

v.

Albina Cooper, Respondent

on Writ of Certiorari to the Supreme Court for
the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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To the Honorable William H. Renquist, the Chief Justice, and the Associate Justices of the Supreme Court of the United States.

James M. Elfelt, Joseph P. Elfelt, Anthony J. Elfelt, Lawrence W. Elfelt, Paul G. Elfelt, David C. Elfelt and Steven M. Elfelt, the Petitioners herein, pray that a writ of certiorari issue to review the decision of the Supreme Court of the State of Wisconsin entered in the above-entitled case on June 17, 1992.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Wisconsin Supreme Court have the jurisdictional authority to set aside a Quit Claim Deed of the District Director of the Internal Revenue Service issued pursuant to Sections 6331-6339 of the Internal Revenue Code by holding that the Internal Revenue Service did not have authority to sell a delinquent taxpayer's undivided one-half interest in homestead property held in joint tenancy with his spouse?

2. If the Wisconsin Supreme Court had such jurisdictional authority, do Sections 6331-6339 of the Internal Revenue Code give the Internal Revenue Service the authority to sell a delinquent taxpayer's undivided one-half interest in homestead property held in joint tenancy with his spouse?

PARTIES

The plaintiffs below and the petitioners herein are James M. Elfelt, Joseph P. Elfelt Anthony J. Elfelt, Lawrence W. Elfelt, Paul G. Elfelt, David C. Elfelt and Steven M. Elfelt.

The defendant below and the respondent herein is Albina Cooper. Dale T. Cooper was also a defendant, but died prior to trial. He was not a party to the proceedings before the Supreme Court for the State of Wisconsin.

Neither the United States nor the Internal Revenue Service are a party. However, since both the

respondent and the Wisconsin Supreme Court have questioned the constitutionality of 26 U.S.C. § 6331, 28 U.S.C. § 2403(a) may be applicable.

TABLE OF CONTENTS PAGE

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS 1

I. Constitutional Provisions 1

II. Federal Statutes 2

III. Regulations of the Commissioner of the Internal Revenue Service 4

IV. Wisconsin Statutes 4

STATEMENT OF THE CASE 5

ARGUMENT 17

I. THE WISCONSIN SUPREME COURT EXCEEDED ITS AUTHORITY IN HOLDING THAT THE IRS HAD NO AUTHORITY TO SELL MR. COOPER'S UNDIVIDED ONE-HALF INTEREST BY ADMINISTRATIVE LEVY. 17

II. THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS WITH THE INTERNAL REVENUE CODE AND RELEVANT FEDERAL COURT DECISIONS. 21

A. *The Internal Revenue Service was granted the authority to sell Mr. Cooper's interest in the property by the Internal Revenue Code.* 21

B. *The Wisconsin Supreme Court's decision conflicts with the Eighth Circuit Court of Appeals decision in Herndon v. United States, 501 F.2d 1219 (8th Cir. 1974).* 28

C. *The Wisconsin Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court. Further, the Wisconsin Supreme Court has decided the federal question in a way that conflicts with the applicable decisions of this Court.* 30

III. **THE ADMINISTRATIVE LEVY PROCEDURES, AS APPLIED, ARE CONSTITUTIONAL.** 38

CONCLUSION 41

APPENDIX 42

TABLE OF AUTHORITIES

CASES	PAGE
Blacklock v. United States, 208 U.S. 75 (1908)	26
Bull v. United States, 295 U.S. 247 (1935)	22
Ginter v. Southern, 611 F.2d 1226 (8th Cir. 1979), cert. denied, 446 U.S. 967 (1980)	38
Hancock v. Train, 426 U.S. 167 (1976)	19
Herndon v. United States, 501 F.2d 1219 (8th Cir. 1974)	28, 29 30, 39
Hines v. Davidowitz, 312 U.S. 52 (1940)	20
Mayo v. United States, 319 U.S. 441 (1943)	18
Middleton TP. v. N/E Reg. Off., U.S. Postal Serv., 601 F.Supp. 125 (N.J. 1985)	18
Monday v. Milwaukee County Expressway Comm., 29 Wis. 2d 372, 139 N.W.2d 26 (1966)	22

Nichols v. Nichols, 43 Wis. 2d
346, 168 N.W.2d 876 (1969) 28

Popp v. Aberlein,
409 F.2d 309 (7th Cir. 1969) 19

In Matter of Trust of Sensenbrenner,
76 Wis. 2d 625, 252 N.W.2d 47 (1977) 40

Ex Parte Siebold,
100 U.S. 371 (1879) 17

Tarble's Case,
80 U.S. 397 (1872) 17

United States v. Dallas National Bank,
152 F.2d 582 (5th Cir. 1946) 18

United States v. Heck,
499 F.2d 778 (9th Cir. 1974),
cert. denied, 419 U.S. 1088 (1974) 38

United States v. National Bank
of Commerce,
427 U.S. 713 (1985) 18, 26, 27
30, 31, 36
37, 38

United States v. Rogers,
461 U.S. 677 (1983) 30, 33
35, 39

United States v. Town of Windsor, CT,
765 F.2d 16 (2d Cir. 1985) 19

CONSTITUTIONAL PROVISIONS **PAGE**

Article VI, Clause II of the U.S. Constitution 1, 17, 18

Article XVI, U.S. Constitution 2, 21

Treas. Reg. § 301.6334-1(c) 4, 25, 29

STATUTES

26 U.S.C. § 6236(h)(1) 24

26 U.S.C. § 6331 7, 11, 16, 21, 25 32, 34, 35, 38

26 U.S.C. § 6331(a) 31, 34

26 U.S.C. § 6331(b) 23

26 U.S.C. § 6331(d) 30

26 U.S.C. § 6332(a) 31

26 U.S.C. § 6334 23, 24, 34

26 U.S.C. § 6334(a) 4, 24

26 U.S.C. § 6334(a)(13) 24

26 U.S.C. § 6334(c) 23, 24

26 U.S.C. § 6334(e) 24

26 U.S.C. § 6335	8, 11, 21 23, 25, 35
26 U.S.C. § 6337	11, 23
26 U.S.C. § 6338	11, 25
26 U.S.C. § 6338(b)	8, 23
26 U.S.C. § 6339	25
26 U.S.C. § 6339(b)(2)	23, 35
26 U.S.C. § 6343	37, 40
26 U.S.C. § 6343(b)	34, 37
26 U.S.C. § 7402	22
26 U.S.C. § 7402(a)	22
26 U.S.C. § 7403	22, 26, 33 34, 35
26 U.S.C. § 7426	37, 40
26 U.S.C. § 7426(a)(1)	35, 38
26 U.S.C. § 7426(b)(1)	35
26 U.S.C. § 7426(b)(2)(A)	35
Wis. Stat. § 700.17(2)(a)	4, 36

Wis. Stat. § 706.02(1)(f) 4

Wis. Stat. § 804.12 13

Wis. Stat. § 814.025 13

Chapter 842, Wisconsin Statutes 6, 9

OPINIONS BELOW

The decision of the Supreme Court for the State of Wisconsin is reported as *Elfelt v. Cooper*, 168 Wis. 2d 1009, 485 N.W.2d 56 (1992). (Appendix at 101.) The decision of the Court of Appeals of the State of Wisconsin is reported as *Elfelt v. Cooper,* 163 Wis. 2d 484, 471 N.W.2d 303 (Ct. App. 1991). (Appendix at 120.)

JURISDICTION

The decision of the Supreme Court for the State of Wisconsin was entered on June 17, 1992. Jurisdiction to review the decision of the Supreme Court of the State of Wisconsin is conferred on this Court by 28 U.S.C. § 2101(c) and 28 U.S.C. § 2104.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

I. Constitutional Provisions

Article VI, Clause II of the United States Constitution provides:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Article XVI of the Amendments to the United States Constitution provides:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

II. Federal Statutes

26 U.S.C. § 6321. Lien for Taxes. (Appendix at 147.)

26 U.S.C. § 6331. Levy and Distraint. (Appendix at 147.)

26 U.S.C. § 6334. Property exempt from Levy. (Appendix at 150.)

27 U.S.C. § 6335. Sale of Seized Property. (Appendix at 152.)

26 U.S.C. § 6337. Redemption of Property. (Appendix at 156.)

26 U.S.C. § 6338. Certificate of Sale; Deed of Real Property. (Appendix at 157.)

26 U.S.C. § 6339. Legal Effect of Certificate of Sale of Personal Property and Deed of Real Property. (Appendix at 158.)

26 U.S.C. § 6343(b). Authority to Release Levy and Return Property. Return of Property. (Appendix at 160.)

26 U.S.C. § 7402. Jurisdiction of District Courts. (Appendix at 161.)

26 U.S.C. § 7403. Actions to enforce lien or to subject property to payment of tax. (Appendix at 162.)

26 U.S.C. § 7426. Civil Actions by Persons Other than Taxpayers. (Appendix at 164.)

III. Regulations of the Commissioner of the Internal Revenue Service.

Treas. Reg. § 301.6334-1(c) provides:

> (c) Other Property. No other property or rights to property are exempt from levy except the property specifically exempted by Section 6334(a). No provision of a State law may exempt property or rights to property from levy for the collection of any Federal tax. Thus, property exempt from execution under State personal or homestead exemption laws is, nevertheless, subject to levy by the United States for collection of its taxes.

IV. Wisconsin Statutes.

Wis. Stat. § 700.17(2)(a) provides:

> CHARACTERISTICS OF JOINT TENANCY. (a) Each of 2 or more joint tenants has an equal interest in the whole property for the duration of the tenancy, irrespective of unequal contributions at its creation. On the death of one of 2 joint tenants, the survivor becomes the sole owner; on the death of one of 3 or more joint tenants, the survivors are joint tenants of the entire interest.

Wis. Stat. § 706.02(1)(f) provides:

> Formal Requisites.
> (1) Transactions under s. 706.01(1) shall not be valid unless evidenced by a conveyance which:
> . . .

(f) is signed, or joined in by a separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01(7) . . ..

Wis. Stat. § 842.02. Partition; Plaintiffs. (Appendix at 167.)

Wis. Stat. § 842.14. Judgment of Partition. (Appendix at 168.)

Wis. Stat. § 842.17. Interlocutory Judgment of Sale. (Appendix at 168.)

STATEMENT OF THE CASE

The petitioners, the Elfelts, (hereinafter referred to as "Elfelts") are seven brothers. They commenced this action in the Circuit Court for Waukesha County, Wisconsin against the respondent, Albina Cooper and her now-deceased husband, defendant, Dale T. Cooper. The relief requested by the Elfelts in their amended complaint was as follows:

1. Declaring the Elfelts to be owners of an undivided one-half interest as tenants-in-common with Mrs. Cooper as successors in interest of Mr. Cooper to the real property occupied by Mrs. Cooper and Mr. Cooper as their home.

2. A partition of the real estate pursuant to Chapter 842 of the Wisconsin Statutes and for a sale of the premises with the proceeds of the sale being paid into court and divided among the parties according to their respective rights and interests.

3. For the sum of $300.00 per month as and for the Elfelts' proportionate share of the reasonable rental value of the property subsequent to January 1, 1987 until such time as Mrs. Cooper and Mr. Cooper vacate the premises to be paid out of Mrs. Cooper's share of the proceeds of sale.

Elfelts alleged in their complaint that on June 25, 1986 the Internal Revenue Service (hereinafter referred to

as "IRS") sold to their parents, John and Stacy Elfelt, all the right, title and interest of Mr. Cooper in and to the real estate and that John and Stacy Elfelt quit-claimed their interest in the property to them.

On December 6, 1984, the IRS assessed Mr. Cooper for income taxes in the amount of $13,283.22 for the tax period ending December 31, 1982. Notice of the assessment was sent to Mr. Cooper on December 19, 1984.

On January 11, 1985, the IRS Filed a lien notice against the real estate interest of Mr. Cooper in Waukesha County, Wisconsin. The IRS then seized Mr. Cooper's interest in the real estate located at 38050 Dolmar Park Road, Dousman, Waukesha County, Wisconsin pursuant to 26 U.S.C. § 6331 and mailed notice of the seizure to Mr. Cooper on November 15, 1985.

On June 25, 1986, the IRS conducted a tax sale of Mr. Cooper's interest in the real estate located at 38050 Dolmar Park Road, Dousman, Wisconsin pursuant to 26

U.S.C. § 6335. Notice of the sale was mailed to Mr. Cooper on June 9, 1986, was posted at the Post Office in Dousman, Wisconsin on June 10, 1986 and was published in the *Waukesha Freeman* on June 14, 1986. At the time of the seizure and sale Mr. Cooper owned the real estate in joint tenancy with Mrs. Cooper.

Mr. John Elfelt was the successful bidder at the tax sale. He purchased Mr. Cooper's interest in the real estate on behalf of himself and his wife and paid the sum of $12,785.02.

Mr. Cooper did not redeem the property and on January 5, 1987, the District Director of the IRS executed a District Director's Quit Claim Deed to John and Stacy Elfelt pursuant to 26 U.S.C. § 6338(b). On February 2, 1987, John and Stacy Elfelt quit claimed their interest in the property to the petitioners.

On January 1, 1987 John Elfelt made written demand upon Mrs. Cooper for a proportionate share of the reasonable rental value of the property.

The Elfelts originally filed a pro se complaint against Mr. Cooper and Mrs. Cooper in March of 1988. The Elfelts retained legal counsel and on January 10, 1989 filed an amended summons and complaint and requested that the court declare that the Elfelts were the owners of an undivided one-half (1/2) interest as tenants in common with Mrs. Cooper as the successors in interest of Mr. Cooper, for a partition of the premises pursuant to Chapter 842 of the Wisconsin Statutes, and for the Elfelts' proportionate share of the reasonable rental value of the premises subsequent to January 1, 1987 as the Elfelts had made a written demand for such rent as of that date. In response to the Elfelts' amended summons and complaint, Mrs. Cooper and Mr. Cooper filed pro se a motion to dismiss. The motion to dismiss was denied by the Trial Court.

Mr. Cooper died on April 1, 1989. On April 25, 1989 Mrs. Cooper then filed a pro se answer to the amended complaint and another motion to dismiss with a brief in support of the motion.

On May 16, 1989, the Elfelts filed a notice of motion and motion for an order denying Mrs. Cooper's motion to dismiss and for summary judgment in favor of the Elfelts. The motion for summary judgment asked for the relief which was requested in the Elfelts' amended complaint.

Mrs. Cooper then retained legal counsel. A hearing was held on the Elfelts' motion for an order denying Mrs. Cooper's motion to dismiss and for summary judgment on June 5, 1989.

Although the Trial Court did not address whether there were issues of fact, the court stated "that this is not an appropriate case for summary judgment" and denied the Elfelts' motion. An order was entered denying the Elfelts'

motion for summary judgment and Mrs. Cooper's motion to dismiss.

On September 6, 1989, Mrs. Cooper filed a third-party summons, amended answer, affirmative defenses, and counterclaim, including a third-party complaint against John Elfelt. The answer set forth the affirmative defenses that the IRS failed to make a lawful assessment or follow proper procedures under the Internal Revenue Code, that the seizure and sale of Mr. Cooper and Mrs. Cooper's property was not in compliance with state law, that the sale and seizure was in violation of the Wisconsin State Constitution, and that the complaint failed to state a claim upon which relief could be granted. The counterclaim alleged the District Director's Quit Claim Deed was invalid due to lack of a statutorily required assessment, and that the levy and transfer was not in compliance with Sections 6331, 6335, 6337 and 6338 of Chapter 64 of the Internal Revenue Code of 1954.

John Elfelt filed a motion to dismiss the third-party complaint against him. Prior to the hearing the parties filed a stipulation for dismissal of the third-party complaint and an order was entered dismissing it.

A trial to an advisory jury was conducted on April 17, 18 and 19, 1990. At the conclusion of the evidence, the court submitted the following verdict question to the jury:

> Did the Internal Revenue Service comply with the legal requirements in selling to John and Stacy Elfelt all of Dale T. Cooper's interest in the real property located at 38050 Dolmar Park Road, Dousman, Wisconsin?

The jury answered the verdict question by stating, "The Internal Revenue Service did comply."

The parties each submitted motions after verdict. The Elfelts' motion requested that a judgment be entered determining that the Elfelts and Mrs. Cooper were each owners in fee simple of an undivided one-half interest in the property, that the property be sold at public auction, that the proceeds be split between the parties, that the Elfelts be

awarded rent as of January 1, 1987, and that the court award to the Elfelts reasonable attorney's fees pursuant to Sections 814.025 and 804.12 of the Wisconsin Statutes. Mrs. Cooper's motion requested the court direct entry of judgment notwithstanding the verdict. Mrs. Cooper argued that the IRS did not have the legal authority to sell the property through the administrative levy and sale procedures of the Internal Revenue Code. Mrs. Cooper also argued that the use of administrative levy procedures to sell Mr. Cooper's interest in the family homestead property would be unconstitutional.

A hearing was conducted regarding the motions on May 14, 1990. After hearing the arguments of counsel, the trial judge denied Mrs. Cooper's motion and granted the Elfelts' motion in part. The trial judge ruled that rent be paid from the date of the jury's verdict, rather than from the date of demand. Formal Findings of Fact, Conclusions

of Law and a Judgment were entered May 24, 1990. (Appendix at 140.)

Mrs. Cooper filed a notice of appeal with the Court of Appeals for the State of Wisconsin and the Elfelts subsequently filed a notice of cross appeal. Mrs. Cooper argued that the IRS did not have the legal authority to transfer ownership of Mr. Cooper's property through administrative levy procedures and that the application of the administrative levy procedures to allow the sale of Mr. Cooper's interest in the family homestead would be unconstitutional. (Court of Appeals Brief of Appellant at 7-10.) The Elfelts appealed the Trial Court's award of a proportionate share of the reasonable rental value of the property as of April 19, 1990 (the date of the jury's verdict), rather than as of January 1, 1987 (the date written demand was made for the rent). In addition, the Elfelts argued, "State courts have no jurisdiction to review the determination of a federal agency, exercising powers

conferred by federal statutes and concerning a matter over which such agency has exclusive jurisdiction." (Court of Appeals Brief of Respondent at 9 and 10.) The Court of Appeals held that the IRS had the legal authority to levy and sell Mr. Cooper's equal interest in the homestead held in joint tenancy, and entitling the Elfelts to rent and partition. (Appendix at 120.)

Mrs. Cooper petitioned the Supreme Court for the State of Wisconsin for a review of the decision of the Court of Appeals. Mrs. Cooper once again argued that the IRS did not have the legal authority to transfer ownership of Mr. Cooper's undivided one-half interest in the homestead property by the use of administrative levy procedures and that the application of the administrative levy procedures to allow the sale would be unconstitutional. (Supreme Court Brief of Petitioner at 9 and 17.) The Elfelts again argued, "State courts have no jurisdiction to review the determination of a federal agency, exercising powers

conferred by federal statutes and concerning a matter over which such agency has exclusive jurisdiction." (Supreme Court Brief of Respondents at 19.)

The Wisconsin Supreme Court held that without Mrs. Cooper's consent, and in the absence of court action, Section 6331 of the Internal Revenue Code does not give the IRS the authority to sell Mr. Cooper's interest in the homestead. The Wisconsin Supreme Court reversed the Court of Appeals and remanded to the Circuit Court with directions to enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute. (Appendix at 101.) The Elfelts filed a motion with the Circuit Court for an order staying the entry of a judgment directed by the Wisconsin Supreme Court to enable them to obtain a writ of certiorari from the Supreme Court of the United States and pending the review of the decision of the Wisconsin Supreme Court. The Circuit Court granted the motion.

ARGUMENT

I. THE WISCONSIN SUPREME COURT EXCEEDED ITS AUTHORITY IN HOLDING THAT THE IRS HAD NO AUTHORITY TO SELL MR. COOPER'S UNDIVIDED ONE-HALF INTEREST BY ADMINISTRATIVE LEVY.

The Wisconsin Supreme Court does not have jurisdiction to review the acts of the Internal Revenue Service, a federal agency. Article VI, Clause II of the United States Constitution provides:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; *and the judges in every state shall be bound thereby*, any thing in the constitution or laws of any state to the contrary notwithstanding. (Emphasis added.)

Whenever a conflict arises between state and federal law, those of the federal law are supreme. *See e.g., Ex Parte Siebold*, 100 U.S. 371 (1879); *Tarble's Case*, 80 U.S. 397

(1872). The United States Court of Appeals for the Fifth Circuit recognized this proposition when it stated, "Having been enacted within the scope of the power delegated to the federal government, the Internal Revenue Statutes are a part of the supreme law of the land. If they are in conflict with state law, constitutional or statutory, the latter must yield." *United States v. Dallas National Bank*, 152 F.2d 582, 585 (5th Cir. 1946).

> [I]t is well established that the doctrine of federal supremacy protects the legitimate activities of the United States government from regulation by state and local authorities. See e.g., *Mayo v. United States*, 319 U.S. 441, 63 S. Ct. 1137, 87 L. Ed. 1504 (1943). The effect of this principle, which derives from the supremacy clause, Article VI, Clause II of the Constitution, is that unless Congress clearly and affirmatively declares that federal instrumentalities shall be subject to state regulation, the federal function must be left free of such regulation. *Middleton TP. v. N/E Reg Off, U.S. Postal Serv.*, 601 F. Supp. 125, 127 (N.J. 1985).
>
> Absent congressional consent, direct state regulation of the activities of the government is barred by the supremacy clause. As the Supreme Court has stated: "Because of the fundamental importance of the principles shielding federal installations and activities

> from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous"." *United States v. Town of Windsor, CT*, 765 F. 2d 16, 18 (2d Cir. 1985). (Citing *Hancock v. Train*, 426 U.S. 167, 179, 96 S. Ct. 2006, 2013, 48 L. Ed. 2d 555 (1976).

The Wisconsin Supreme Court simply had no jurisdiction to determine what authority the IRS does or does not have, nor does it have jurisdiction to void an act of the Internal Revenue Service.

The Wisconsin Supreme Court stated that the state court was a proper forum for this action and for Mrs. Cooper's defense to the action relying upon *Popp v. Aberlein*, 409 F.2d 309, 311 (7th Cir. 1969). The Elfelts do not dispute that a state court is a proper forum for a quiet title action. However, under the Supremacy Clause, the state court was bound to enforce the Internal Revenue Code and the actions of the IRS taken pursuant thereto.

The state court had no jurisdiction to find that the IRS exceeded its authority.

Where the federal government, in the exercise of its superior authority, has enacted a complete scheme of regulation, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or compliment, the federal law, or enforce additional or auxhiliary regulations. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1940). The State of Wisconsin cannot, therefore, impose the additional requirement of Mrs. Cooper's consent in order to convey Mr. Cooper's interest in the property. State law cannot stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67.

II. THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS WITH THE INTERNAL REVENUE CODE AND RELEVANT FEDERAL COURT DECISIONS.

A. *The Internal Revenue Service was granted the authority to sell Mr. Cooper's interest in the property by the Internal Revenue Code.*

Article XVI of the United States Constitution expressly granted Congress the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration. In accordance with Article XVI the Congress enacted the Internal Revenue Code found at Title 26 of the United States Code.

In general, the Internal Revenue Service may collect assessed taxes in one of two ways. First, the IRS can seize and detain the delinquent taxpayer's property and sell it to satisfy the tax claim. 26 U.S.C. §§ 6331 and 6335. No

judicial action or judgment is necessary in such proceedings, as the assessment supercedes the pleading, proof and judgment necessary in an action at law, and has the force of a judgment. *Bull v. United States*, 295 U.S. 247, 260 (1935), cited in *Monday v. Milwaukee County Expressway Commission*, 29 Wis. 2d 372, 379, 139 N.W. 2d 26 (1966). Second, the IRS may sue in court for the collection of delinquent taxes. 26 U.S.C. §§ 7402 and 7403. The IRS may institute a lawsuit either before or after assessment, to collect taxes, penalties, and interest, etc. or the IRS can sue after assessment to enforce a tax lien on the delinquent taxpayer's property. *Id.* However, the judicial remedies granted to the IRS are in addition to the administrative seizure and sale remedies. 26 U.S.C. § 7402(a). The IRS may choose whatever method of collection it desires. In this case, the IRS chose the administrative method of seizure and sale.

In any case in which the IRS may levy upon property, the IRS may seize and sell that property. It makes no difference whether the property is real or personal, tangible or intangible. 26 U.S.C. § 6331(b). In the case of any real property sold as provided in 26 U.S.C. § 6335 and not redeemed in the manner and within the time provided in 26 U.S.C. § 6337, the IRS shall execute to the purchaser of such real property at such sale a deed of the real property so purchased. 26 U.S.C. § 6338(b). The deed shall be considered and operate as a conveyance of all the right, title, and interest the delinquent taxpayer had in and to the real property thus sold. 26 U.S.C. § 6339(b)(2).

Section 6334(c) of the Internal Revenue Code specifically provides that "notwithstanding any other law of the United States, no property or rights to property are exempt from levy except those specifically enumerated in Code Section 6334." Nothing in § 6334 exempts from levy any right to property held in joint tenancy. On the date of

the sale, June 25, 1986, § 6334 did not contain any exemption for a homestead. A taxpayer's principal residence is only exempt from levies issued after June 30, 1989. Public Law 100-647, § 6236(h)(1), November 10, 1988, now codified at 26 U.S.C. § 6334(a)(13). However, even after June 30, 1989, the taxpayer's principal residence is not exempt if either an Internal Revenue Service District Director or an Assistant District Director personally approves the levy in writing, or the Internal Revenue Service finds that the collection of the tax is in jeopardy. 26 U.S.C. § 6334(e).

The Commissioner of the Internal Revenue Service has promulgated a regulation explaining Section 6334(c) which states:

> (c) Other Property. No other property or rights to property are exempt from levy except the property specifically exempted by Section 6334(a). No provision of a State law may exempt property or rights to property from levy for the collection of any Federal tax. Thus, property exempt from execution under State personal or homestead exemption laws

> is, nevertheless, subject to levy by the United States for collection of its taxes. Treas. Reg. § 301.6334-1(c).

The Wisconsin Supreme Court held that the IRS had no authority to transfer Mr. Cooper's undivided one-half interest in the homestead. The court held such on the premise that Section 6331 is only a provisional administrative remedy which does not determine any proprietary rights to the property. However, the Wisconsin Court of Appeals correctly recognized that Section 6331 is provisional only because third-party's rights are not resolved. 163 Wis. 2d at 495; Appendix at 130. Sections 6335, 6338 and 6339 of the Internal Revenue Code clearly grant the IRS the authority to sell a delinquent taxpayer's right, title and interest in real property.

The Wisconsin Supreme Court stated that there is no way to convey any interest in a jointly-held spousal homestead in Wisconsin without both spouses' consent except through court proceedings, such as a divorce,

bankruptcy, or lien foreclosure. 168 Wis. 2d at 1023; Appendix at 116-17. However, as the Wisconsin Court of Appeals recognized, such a limitation is a state law consequence of a property interest and it becomes inoperative to prevent an administrative levy. 163 Wis. 2d at 497; Appendix at 127. *See United States v. National Bank of Commerce*, 472 U.S. 713, 722 (1985).

In the case of *Blacklock v. United States*, 208 U.S. 75 (1908), the court stated:

> If Congress had intended to prescribe a formal suit in equity as the only mode by which the government could sell real estate upon which it had a lien for Internal Revenue taxes, and upon which private parties also had liens by mortgage or deed of trust, it would have done so in clear words, particularly as Congress knew at the time of the then-existing remedy by distraint. The words used do not show that Congress intended a suit in equity as exclusive of all other methods in such cases. 28 S.Ct. at 232.

The Wisconsin Supreme Court held that the IRS, if it wished to pursue Mr. Cooper's interest in the property, must institute a lien-foreclosure suit under Section 7403

joining Mrs. Cooper as a defendant and eliminated the alternative procedure for administrative levy under Sections 6331 and 6332. As this court stated in *United States v. National Bank of Commerce, supra* at 732-33, the alternative relief of the administrative levy has been clearly provided for the Government by Congress. While it is true that the administrative levy procedure cannot be used to sell the entire property, including Mrs. Cooper's interest, it clearly can be used to sell Mr. Cooper's undivided one-half interest.

In a levy proceeding, the IRS "steps into the taxpayer's shoes." *United States v. National Bank of Commerce, supra* at 725. The purchaser at the sale receives all the right, title, and interest of the taxpayer and, therefore, also steps into the taxpayer's shoes. In Wisconsin, persons having an interest in real property jointly with others may sue for judgment partitioning such interests unless an action for partition has been prohibited

by the Wisconsin Statutes or by agreement between the parties. Wis. Stat. § 842.02(1); Appendix at 167; *Nichols v. Nichols*, 43 Wis. 2d 346, 349, 168 N.W.2d 876 (1969). Nothing in the Wisconsin Statutes prohibits a spouse from bringing an action to partition homestead property held in joint tenancy with his or her spouse. Therefore, since Mr. Cooper could have commenced such an action while he held the property in joint tenancy with Mrs. Cooper, the Elfelts, by stepping into Mr. Cooper's shoes, also had the right to commence this action and obtain the judgment of partition granted by the trial court.

B. *The Wisconsin Supreme Court's decision conflicts with the Eighth Circuit Court of Appeals decision in Herndon v. United States, 501 F.2d 1219 (8th Cir. 1974).*

In *Herndon v. United States*, 501 F. 2d 1219 (8th Cir. 1974), the wife of the delinquent taxpayer brought an action seeking to enjoin the United States from selling the homestead property which was titled solely in her husband's

name and levied upon for unpaid taxes. She argued that the federal government could not sell the real property titled solely in her husband's name due to her alleged property interest under the Arkansas Homestead Exemption Law. The court disagreed and held that State Homestead Exemption Laws cannot preclude the United States from levying upon and selling the taxpayer's interest in the property. The court stated that the sale would not violate due process simply because the wife would not be a party to the non-judicial proceeding because the sale would only convey whatever "right, title, and interest" that the taxpayer might have under state law. The wife's rights and interest in the real property, if any, would not be conveyed, and, therefore, she would neither be a proper party nor would her due process rights be violated. *Id.* at 1220 n.4.

The *Herndon* court stated at page 1221:

> The Code and particularly [Treas. Reg. § 301.6334-1(c)] therefore, take the view that only the federal exemption statute exempts property from a federal

> levy. A necessary corollary to this view is that even if state laws do create a property interest pursuant to a homestead exemption law, the United States can still levy upon that property. *Herndon v. United States*, 501 F.2d 1219, 1221 (8th Cir. 1974).

C. *The Wisconsin Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court. Further, the Wisconsin Supreme Court has decided the federal question in a way that conflicts with the applicable decisions of this Court.*

Read together, this Court's decisions of *United States v. National Bank of Commerce*, 472 U.S. 713 (1985) and *United States v. Rogers*, 461 U.S. 677 (1983) established that the Wisconsin Supreme Court's holding is erroneous.

In *United States v. National Bank of Commerce*, *supra*, the IRS assessed federal income taxes, penalties, and interest against a taxpayer and tried to levy on the taxpayer's joint bank accounts pursuant to 26 U.S.C. § 6331(d) for the amount still due on such assessment. The United States District Court for the Eastern District of

Arkansas granted the bank's motion to dismiss and the United States Court of Appeals for the 8th Circuit affirmed and held that the IRS administrative levy was not normally intended for use as against property in which third parties had an interest or as against property bearing on its face the names of third parties. This Court reversed. The Court stated at page 719-720:

> The statutory language "all property and rights to property" appearing in § 6321 (and, as well, in §§ 6331(a) and, essentially, in 6332(a), . . .) is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have. (Citation omitted.) "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." (Citation omitted.)

This Court in *National Bank of Commerce* stated that the bank's only defense was that the joint accounts did not constitute "property or rights to property" of the taxpayer. *Id.* at 722. The Court noted:

> "[I]n the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property." (Citations omitted.) This follows from the fact that

> the federal statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." (Citations omitted.) And those consequences are "a matter left to federal law." (Citation omitted.) "[O]nce it has been determined that state law creates sufficient interest in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative," and the tax consequences thenceforth are dictated by federal law. (Citations omitted.) *Id.*

State law defines "the nature of the taxpayer's interest in the property, but the state-law consequences of that definition are of no concern to the operation of the federal tax law." *Id.* at 723.

The Court, however, did not address the issue presented here. In a footnote the Court stated:

> We stress the narrow nature of our holding. By finding that the right to withdraw funds from a joint bank account is a right to property subject to administrative levy under § 6331, we express no opinion concerning the federal characterization of other kinds of state-law created forms of joint ownership. This case concerns the right to levy only upon joint bank accounts. *Id.* at 726 n.10.

Although the Court has not addressed the issue of whether or not the administrative levy procedures give the

IRS the authority to sell a taxpayer's undivided one-half interest in a jointly held homestead, the decision of *United States v. Rogers*, 461 U.S. 677 (1983) makes it clear that such authority exists. The issue in *Rogers* was whether Section 7403 of the Internal Revenue Code empowered a federal district court to order the sale of the *entire* family home in which a delinquent taxpayer had an interest at the time he incurred his indebtedness, but in which the taxpayer's spouse, who does not owe any of that indebtedness, also has a separate homestead right as defined by Texas law. *Id.* at 680. Although the case involved a judicial foreclosure, the Court specifically recognized the administrative levy procedures as a method for the collection of delinquent taxes. *Id.* at 682-83.

The Court noted in *Rogers* that the Texas homestead laws provided that the owner or claimant of the property claimed as homestead may not, if married, sell or abandon the homestead without the consent of the other spouse. *Id.*

at 684-85. The Court did not, however, hold, as did the Wisconsin Supreme Court here, that the requirement of spousal consent prohibited an administrative levy and sale. Such a restrictive reading flies in the face of the plain language of the Internal Revenue Code, especially Section 6334 which provides the exemptions to the administrative levy and sale. As the court stated:

> [O]ur reading of the statute is significantly bolstered by a comparison with the statutory language setting out the administrative levy remedy also available to the Government. Under 26 U.S.C. § 6331(a), the Government may sell for the collection of unpaid taxes all non-exempt "property and rights to property . . . *belonging to such person* [*i.e.*, the delinquent taxpayer] or on which there is a lien provided in this chapter for the payment of such tax" (emphasis added). This language clearly embodies the limitation that the Court of Appeals thought was present in § 7403, and it has been so interpreted by the courts. Section 6331, unlike § 7403, does not require notice and hearing for third parties, because no rights of third parties are intended to be implicated by § 6331. Indeed, third parties whose property or interests in property have been seized inadvertently are entitled to claim that the property has been "wrongfully levied upon" and may apply for its return either through administrative channels, 26 U.S.C. § 6343(b), or through a civil action filed in a

federal district court, § 7426(a)(1); see §§ 7426(b)(1), 7426(b)(2)(A). *Id.* at 695-96.

Section 6331 and 6335 are intended to permit the IRS to convey "all the right, title and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto." 26 U.S.C. § 6339(b)(2). Therefore, the state-created homestead exemptions against forced sale are not effective, just as the Texas state-created exemptions against forced sale were not effective in *Rogers*. *Id.* at 700-01. Just as this Court declined to frustrate the policy of Section 7403 by reading an exception of the sort carved out by the Court of Appeals in *Rogers* since no such exception appeared on the face of the statute, the Court should refuse to carve out such an exception to Sections 6331 and 6335. The dissent in *Rogers* urged the Court to carve out an exception from the plain language of Section 7403 in that small number of joint-ownership situations in which the delinquent taxpayer

had no right to force partition or otherwise to alienate the entire property without the consent of the co-owner. However, the Court refused to do so. *Id.* at 702.

Mrs. Cooper's only defense in this case is that Mr. Cooper did not have an interest in the real estate. However, he clearly did. In Wisconsin, each of two or more joint tenants has an equal interest in the whole property for the duration of the tenancy. Wis. Stat. § 700.17(2)(a). In other words, Mr. Cooper had an undivided one-half interest in the real estate with Mrs. Cooper.

"The question whether a state-law right constitutes "property" or "rights to property" is a matter of federal law." *United States v. National Bank of Commerce*, *supra* at 727. "That another party or parties may have competing claims . . . is not a legitimate statutory defense." *Id.*

This Court in *National Bank of Commerce* noted that other claimants, if they feel they have rights in and to the property, may assert them.

> Congress recognized this when the Code's summary-collection procedures were enacted . . . and when it provided in Section 7426 of the Code . . . that one claiming an interest in property seized for another's taxes may bring a civil action against the United States to have the property or the proceeds of its sale returned. Congress also has provided, by § 6343(b), an effective and inexpensive administrative remedy for the return of the property. *Id.* at 728.

Mrs. Cooper's remedies, if any she may have, were available to her pursuant to sections 6343 and 7426 of the Internal Revenue Code. Both of these sections provide a remedy as long as a claim is made within nine (9) months of the date of the levy. State court was simply not the proper forum for Mrs. Cooper to be making her arguments. Even the dissent in *National Bank of Commerce* recognized that "If an individual discovers a levy and believes that it was wrongful, his or her only recourse is to seek administrative review under 26 U.S.C. § 6343(b) within nine (9) months or file suit in federal district court under 26

U.S.C. § 7426(a)(1) within the same amount of time." *Id.* at 736.

III. THE ADMINISTRATIVE LEVY PROCEDURES, AS APPLIED, ARE CONSTITUTIONAL.

Although the Wisconsin Supreme Court did not reach Mrs. Cooper's constitutional arguments, the court stated that it was doubtful of the constitutionality of the actions of the IRS in this case. 168 Wis. 2d 1009, 1019-20 n.3; Appendix at 111.

The levy and distraint procedures of Section 6331 have been repeatedly upheld as constitutional. *Ginter v. Southern*, 611 F.2d 1226 (8th Cir. 1979), cert. denied, 446 U.S. 967 (1980); *U.S. v. Heck*, 499 F.2d 778 (9th Cir. 1974), cert. denied, 419 U.S. 1088 (1974).

"The constitutionality of the levy procedure, of course, 'has long been settled.'" *United States v. National Bank of Commerce*, *supra* at 721. Certainly, if the administrative levy procedure can be used to seize a

co-depositor's interest in a joint bank account, leaving the co-depositor with nothing, it can apply to a taxpayer's interest in real property which leaves the other co-tenant's interest intact. As pointed out in Section II hereof, this was recognized by the Eighth Circuit Court of Appeals in *Herndon v. United States*, 501 F.2d 1219 (8th Cir. 1974).

Further, as this Court noted in *Rogers*, if there were any Takings Clause objection to the administrative levy procedures, such an objection could not be envoked on behalf of property interests that came in to being after enactment of those provisions of the Internal Revenue Code. 461 U.S. at 697 n.24. In this case, as in *Rogers*, the homestead estate at issue came in to being long after enactment of the Internal Revenue Code.

In any event, the parties never litigated the issue of whether or not Mrs. Cooper received actual notice of the levy and sale. Although Mrs. Cooper testified as a witness at the time of trial, she did not testified that she never

received any notice of either the levy or the sale. "The Trial Court, in view of the facts that the issue had not been previously raised and argued, and that no evidence concerning the issue was introduced, properly declined to consider the issue." *In Matter of Trust of Sensenbrenner*, 76 Wis. 2d 625, 647, 252 N.W.2d 47 (1977).

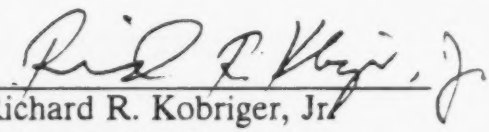
Nevertheless, Mrs. Cooper did have actual knowledge of the levy and sale. Jack H. Phillips, a revenue officer for the Internal Revenue Service, testified at the time of trial that Mrs. Cooper was present when he went to the Cooper residence to serve Mr. Cooper with the papers. (Trial Court transcript of testimony of Jack H. Phillips, Rec. 28 at pp. 4 and 5.) Further, Mrs. Cooper did have actual knowledge of the levy and sale within a sufficient time period to seek administrative review under Sections 6343 and 7426 of the Internal Revenue Code. John Elfelt made written demand upon Mrs. Cooper for a proportionate share of the reasonable rental value of the property on

January 1, 1987. (Rec. 23 at Exhibit 31). In the written demand Mr. Elfelt told Mrs. Cooper he was going to be receiving a District Director's Quit Claim Deed to Mr. Cooper's interest in the property. Mrs. Cooper admitted she received Mr. Elfelt's written demand. (Rec. 23 at Exhibit 36, p. 14). Since the sale occurred on June 25, 1986, Mrs. Cooper still had until March 25, 1987 to seek administrative review.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
CRAMER, MULTHAUF & HAMMES

By: 
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APPENDIX

TABLE OF CONTENTS

	PAGE
1. Decision of the Supreme Court for the State of Wisconsin, *Elfelt v. Cooper*, 168 Wis. 2d 1009, 485 N.W.2d 56 (1992)	101
2. Decision of the Court of Appeals of the State of Wisconsin, *Elfelt v. Cooper*, 163 Wis. 2d 484, 471 N.W. 303 (Ct. App. 1991)	120
3. Findings of Fact, Conclusions of Law and Judgment of the Circuit Court for Waukesha County, Wisconsin, *Elfelt v. Cooper*, 88-CV-0960 (May 24, 1990)	140
4. 26 U.S.C. § 6321, Lien for Taxes	147
5. 26 U.S.C. § 6331, Levy and distraint	147
6. 26 U.S.C. § 6334, Property exempt from levy	150
7. 26 U.S.C. § 6335, Sale of seized property	152
8. 26 U.S.C. § 6337, Redemption of property	156
9. 26 U.S.C. § 6338, Certificate of sale; deed of real property	157
10. 26 U.S.C. § 6339, Legal effect of certificate of sale of personal property and deed of real property	158

11. 26 U.S.C. § 6343, Authority to release levy and return property 160

12. 26 U.S.C. § 7402, Jurisdiction of district courts 161

13. 26 U.S.C. § 7403, Action to enforce lien or to subject property to payment of tax 162

14. 26 U.S.C. § 7426, Civil actions by persons other than taxpayers 164

15. Wis. Stat. § 842.02, Partition; plaintiffs 167

16. Wis. Stat. § 842.14, Judgment of partition 168

17. Wis. Stat. § 842.17, Interlocutory judgment of sale 168

No. 90-1326

STATE OF WISCONSIN : IN SUPREME COURT

James M. Elfelt, Joseph P. Elfelt, Anthony J. Elfelt, Lawrence W. Elfelt, Paul G. Elfelt, David C. Elfelt, and Steven M. Elfelt,

Plaintiffs-Respondents-Cross Appellants,

v.

Albina Cooper,

Defendant-Appellant-Cross Respondent-Petitioner,

Dale T. Cooper,

Defendant.

REVIEW of a decision of the Court of Appeals. Reversed and remanded.

LOUIS J. CECI, J. This case is before the court on a petition for review of a published decision of the court of appeals, Elfelt v. Cooper, 163 Wis. 2d 484, 471 N.W.2d 303 (Ct. App. 1991). The court of appeals affirmed the judgment of the circuit court for Waukesha County, Clair Voss, Circuit Judge, which declared, after a jury trial,

that the plaintiffs (the Elfelts) were owners of an undivided one-half interest in the home of the defendant Albina Cooper (Mrs. Cooper) as tenants in common. The judgment ordered a sheriff's sale of the property and determined an amount of rent due from Mrs. Cooper to the Elfelts.

The issue presented for review is whether § 6331 of the Internal Revenue Code, 26 U.S.C. § 6331 (I.R.C. § 6331),[1] gives the Internal Revenue Service (IRS) the

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[1] I.R.C. §6331 provides in relevant part:

§6331. Levy and distraint

(a) Authority of Secretary

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. . . .

(b) Seizure and sale of property

The term "levy" as used in this title includes the power of distraint and seizure by any means. . . . In any

authority to sell Dale Cooper's (Mr. Cooper) undivided one-half interest in Mr. and Mrs. Cooper's homestead held in joint tenancy. We hold that without Mrs. Cooper's consent, and in the absence of court action, I.R.C. § 6331 does not give the IRS the authority to sell Mr. Cooper's interest in the homestead, and we therefore reverse the court of appeals and remand to the circuit court with directions to enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute.

The facts are as follows. In 1963, the Coopers purchased the property at 38050 Dolmar Park Road, Dousman, Wisconsin, as husband and wife.[2] In 1969, construction of a home on the property was completed, and

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case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

[2] The property is more particularly described as:

Lot 18 in Dolmar Park, a subdivision of part of the NE 1/4 of the SE 1/4 of Section 17, and the NW 1/4 and the SW 1/4 of the SW 1/4 of Section 16, in Township number 6N, Range 17 East, in the town of Ottawa, Waukesha County, Wisconsin.

the Coopers moved in. As of the time the briefs in this case were filed, Mrs. Cooper was age 70 and had lived in the homestead for over 21 years.

On January 11, 1985, the IRS filed a lien notice against the real estate of Mr. Cooper in Waukesha County. The lien was in the amount of $13,283.22 and was for unpaid income taxes for the year 1982. It is undisputed that Mrs. Cooper was not liable for any taxes unpaid by Mr. Cooper. On November 15, 1985, after Mr. Cooper did not pay the amount in dispute, the IRS mailed notice to Mr. Cooper that the IRS had seized Mr. Cooper's interest in the homestead on Dolmar Park Road. The Coopers continued to live in the home after the seizure.

On June 25, 1986, the IRS conducted a tax sale of Mr. Cooper's interest in the home. The successful bidders were John and Stacey Elfelt. On January 1, 1987, John Elfelt made a written demand upon Mrs. Cooper for a proportionate share of the reasonable rental value of the property. On January 5, 1987, the IRS district director issued a quitclaim deed for the interest of Mr. Cooper to John and Stacey Elfelt. John and Stacey Elfelt issued a quitclaim deed to their seven sons, the plaintiffs in this matter.

On March 28, 1988, the Elfelts filed a summons and complaint, which was later amended, requesting that the court declare the Elfelts owners of an undivided one-half interest in the property with Mrs. Cooper as tenants in common, requesting a partition of the property by its sale with one-half of the proceeds to go to the Elfelts, plus rent in the amount of one-half the reasonable rental value of the property subsequent to January 1, 1987. The Coopers both filed pro se motions to dismiss. After a hearing on March 13, 1989, the circuit court denied the Coopers' motions to dismiss. On April 1, 1989, Mr. Cooper died.

Mrs. Cooper filed a pro se answer and a motion to dismiss on April 25, 1989. The Elfelts responded with a motion for summary judgment. Mrs. Cooper retained counsel, and, after a hearing, the circuit court denied both parties' motions.

On September 6, 1989, Mrs. Cooper filed a third-party summons and complaint, an amended answer, affirmative defenses, and a counterclaim for quiet title. The third-party complaint was dismissed by stipulation of the parties. The amended answer and affirmative defenses alleged that the IRS failed to follow certain procedures mandated by the I.R.C., that the seizure and sale was

invalid, and that the quitclaim deed to John and Stacey Elfelt was therefore invalid.

The case was finally tried in April, 1990, to an advisory jury. The court reserved for itself the legal question of whether the IRS had the legal authority to sell Mr. Cooper's interest in the homestead in the manner and form accomplished. The jury was asked to answer one verdict question:

> Did the Internal Revenue Service comply with the legal requirements in selling to John and Stacey Elfelt all of Dale T. Cooper's interest in the real property located at 38050 Dolmar Park Road, Dousman, Wisconsin?

The jury's answer was "They (the Internal Revenue Service) did comply." Mrs. Cooper filed a motion for judgment notwithstanding the verdict, which was denied. The court entered judgment for the Elfelts, finding that the IRS had legally sold Mr. Cooper's interest in the homestead to the Elfelts; declaring the Elfelts and Mrs. Cooper to be tenants in common, each owning in fee simple an undivided one-half interest in the property; ordering a sheriff's sale to partition the property; and ordering Mrs. Cooper to pay rent to the Elfelts.

The court of appeals affirmed the circuit court judgment and remanded for further findings. Elfelt, 163 Wis. 2d at 501-02. We granted Mrs. Cooper's petition for review.

The issue presented by this case, whether I.R.C. § 6331 gives the IRS the authority to sell Mr. Cooper's undivided one-half interest in Mr. and Mrs. Cooper's homestead, involves the application of a statute to an undisputed set of facts. Statutory interpretation is a question of law which we review without deference to the lower courts. Pulsfus Farms v. Town of Leeds, 149 Wis. 2d 797, 803-04, 440 N.W.2d 329 (1989). The jury's verdict in this case, which was advisory only, found that the IRS had complied with the legal requirements in selling Mr. Cooper's interest to John and Stacey Elfelt. We do not review that verdict.

Mrs. Cooper argues that the IRS did not have the authority to transfer ownership of Mr. Cooper's ownership interest in the Coopers' homestead to the Elfelts in the manner and form accomplished: that because the property was a jointly held homestead, it may only be sold with Mrs. Cooper's consent or by a court order in the absence of Mrs. Cooper's consent. Mrs. Cooper also argues that homestead property is indivisible and that therefore, under I.R.C. §

6335, it was improper to sell Mr. Cooper's interest without selling the property in its entirety. Finally, Mrs. Cooper argues that I.R.C. § 6331 is unconstitutional as applied because it does not require that the IRS give notice to all parties having an interest in property before the property is sold.

The Elfelts respond that the IRS did have the authority, under I.R.C. §§ 6331, 6335, 6338, and 6339, to sell Mr. Cooper's undivided one-half interest in the homestead without Mrs. Cooper's consent. In addition, the Elfelts argue that Mrs. Cooper was given remedies by I.R.C. §§ 6337, 6343, and 7426 that she failed to use, that the constitutionality of I.R.C. § 6331 has long been settled, and that state court is not the proper forum for Mrs. Cooper's arguments.

We first note that the state court was a proper forum for this action and for Mrs. Cooper's defense to the action. The Elfelts, not Mrs. Cooper, commenced this action in the state court, seeking to enforce whatever interest they obtained from the IRS, seeking rent from Mr. and Mrs. Cooper, and seeking to have the home sold. The Elfelts should not now complain about Mrs. Cooper presenting her defenses to the action in a forum that the Elfelts chose. In addition, due to Mrs. Cooper's counterclaim, we view this

as a quiet title action. As stated by the U. S. Court of Appeals for the 7th Circuit in a case concerning federal tax sales of parcels of land located in Wisconsin:

> Controversies over title to land within a state are particularly appropriate for determination by the courts of that state. We find nothing anywhere to imply that state courts lack power to decide such questions in a quiet title action on the ground that the conveyances were governed by federal law and were an exercise of federal power.

Popp v. Eberlein, 409 F.2d 309, 311 (7th Cir. 1969). This controversy is properly in the state court system.

The I.R.C. provides the IRS at least three methods of enforcing collection of unpaid taxes. First, the government may sue for the unpaid amount and, if it obtains a judgment, may exercise the usual rights of a judgment creditor. United States v. Rodgers, 461 U.S. 677, 682 (1983) (citing I.R.C. §§ 6502(a), 7401, and 7402(a)).

A second method is a lien foreclosure suit, authorized by I.R.C. § 7403. The suit is a civil action brought in federal district court "to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of

the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability." I.R.C. § 7403(a). Pursuant to I.R.C. § 7403(b), "[a]ll persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto." The suit is a plenary action which requires the court to "adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property." I.R.C. § 7403(C).

A third method that the IRS has for enforcing collection of unpaid taxes is the administrative levy, authorized by I.R.C. § 6331. Under I.R.C. § 6331, the IRS may levy upon and sell the property of a delinquent taxpayer in order to satisfy the tax liability of that taxpayer. As opposed to the plenary nature of a lien foreclosure suit, the levy and distraint authorized by I.R.C. § 6331 is only a provisional method that typically does not require judicial intervention. United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985). In addition, "§ 6331, unlike § 7403, does not 'implicate the rights of third parties,' because an administrative levy, unlike a judicial lien-foreclosure action, does not determine the ownership rights to the property." Id. at 731. If parties other than the delinquent taxpayer claim rights in the levied property, they may assert those rights in a postseizure administrative or judicial

proceeding under I.R.C. § 6343 or § 7426. Id. at 728-29. Parties proceeding under I.R.C. §§ 6343 and 7426 have nine months from the time of the levy to assert their property rights in the levied property. Id. at 736 (Powell, J., dissenting). In addition, property that is sold after it is levied upon may be redeemed by the property owners or any person having an interest therein at any time within 180 days after the sale of the property. I.R.C. § 6337(b).

Mrs. Cooper did not avail herself of the procedures provided in I.R.C. §§ 6337(b), 6343, or 7426. If she had, this case would probably not be before us today. Instead, Mrs. Cooper argues that the IRS did not have the authority to sell Mr. Cooper's interest in the homestead property without Mrs. Cooper's consent and that the sale is, therefore, invalid. We agree.[3]

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[3] Accordingly, we do not reach Mrs. Cooper's argument under I.R.C. § 6335(c) that the property was indivisible and that therefore the IRS should have sold the entire homestead, not just Mr. Cooper's interest. As we find that the IRS did not have the authority to sell Mr. Cooper's interest in the property by administrative sale without Mrs. Cooper's consent, we need not reach the Elfelts' argument that Mrs. Cooper failed to use the remedies provided to her by I.R.C. §§ 6337, 6343, and 7426.

We also do not reach Mrs. Cooper's constitutional

In applying the I.R.C., state law determines the nature of the legal interest which the taxpayer had in the

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arguments. Although the U. S. Supreme Court has stated that "[t]he constitutionality of the levy procedure, of course, 'has long been settled,'" National Bank, 472 U.S. at 721 (citations omitted), we are doubtful of the constitutionality of the actions of the IRS in this case. If we were not to reverse the court of appeals, the IRS's actions would have led to Mrs. Cooper's no longer having a right of survivorship in her spousal homestead, thereby greatly diminishing the value of her property interest. The court of appeals was incorrect when it stated that "[Mrs. Cooper] has the same interest after the sale that she did before the sale." Elfelt, 163 Wis. 2d at 496. Before the sale, Mrs. Cooper had an equal undivided jointly held interest in the whole of the homestead with Mr. Cooper, with a right of survivorship. After the sale, she had an interest in one-half of the property as a tenant in common, with no right of survivorship. This diminution in the value of her property interest, without any requirement that she be given adequate notice by the IRS, puts the application of I.R.C. § 6331 into serious constitutional doubt. See Mennonite Board of Missions v. Adams, 462 U.S. 791, 795-800 (1983) (Prior to an action that will affect an interest in life, liberty, or property protected by the due process clause, a state must provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mere notice by publication is not sufficient when interested parties can be notified by more effective means such as personal service or mailed notice.).

homestead property. National Bank, 472 U.S. at 722. This is because the I.R.C. does not create any property rights, but merely attaches federally defined consequences to rights which are created under state law. Id. Once state law has been used to determine the nature and existence of a property interest, further state law is inoperative, and the tax consequences thenceforth are dictated by federal law. Id. (citing United States v. Bess, 357 U.S. 51, 56-57 (1958)). In a levy proceeding, the IRS "'steps into the taxpayer's shoes' . . . [and] acquires whatever rights the taxpayer himself possesses." Id. at 725 (citations omitted).

In National Bank, the delinquent taxpayer was a codepositor in two jointly held bank accounts. Id. at 716. Relevant state law provisions, as well as the taxpayer's contract with the bank, gave the taxpayer the unqualified right to withdraw the full amounts on deposit in the joint accounts without notice to his codepositors. Id. at 723. The Court stated:

> '[I]t is inconceivable that Congress . . . intended to prohibit the Government from levying on that which is plainly accessible to the delinquent taxpayer-depositor.' . . . The taxpayer's right to withdraw is analogous in this sense to the

> IRS's right to levy on the property and secure the funds. Both actions are similarly provisional and subject to a later claim by a codepositor that the money in fact belongs to him or her.

Id. at 726 (citations and footnote omitted). In a footnote to the above quote, the Court stated:

> We stress the narrow nature of our holding. By finding that the right to withdraw funds from a joint bank account is a right to property subject to administrative levy under § 6331, we express no opinion concerning the federal characterization of other kinds of state-law created forms of joint ownership. This case concerns the right to levy only upon joint bank accounts.

Id. at 726 n.10.

Following National Bank, we must first look to state law to determine the nature and existence of Mr. Cooper's property right in the homestead. Once that is determined, further state law consequences are inoperative, and we must turn to federal law. We bear in mind that the IRS cannot

gain an interest superior to that which Mr. Cooper himself held

Under Wisconsin law, the nature of homestead property held in joint tenancy between husband and wife is such that it is indivisible by one spouse without the consent of the other. Sec. 706.02(1)(f), Stats.[4] The policy objectives of the homestead statute have been long recognized as laudable, providing to each spouse absolutely inalienable rights:

> The policy of the statute indicated is not to give the wife a mere personal right for her personal benefit which she may waive, or be estopped by her conduct from insisting upon, but to protect the home for the benefit of the family and every member of it,–a beneficent policy of the highest character, calling for a broad, liberal

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[4] Sec. 706.02(1)(f), Stats., provides in relevant part: **706.02 Formal requisites.** **(1)** Transactions under s. 706.01(1) shall not be valid unless evidenced (continued) by a conveyance which:

. . .

(f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01(7) . . . .

> application of the statute, so as to carry it out, fully, in letter and spirit. If it should be held that the homestead right is a mere privilege which the wife may waive, or which may be lost under the rules of equitable estoppel, a very efficient way would be open to evade and nullify the statute. Such right is placed high above the reach of any dangers by the absolute disability to alienate the homestead in any manner, except by a joint conveyance of some kind, signed by the husband and wife. The disability of the husband to otherwise convey the homestead is as complete as if it were not alienable at all, and of the wife to otherwise consent to such alienation, as if she were a minor.

Cumps v. Kiyo, 104 Wis. 656, 662, 80 N.W. 937 (1899). While the above-quoted language is dated, it illustrates the nature of the property right that a spouse owns in a homestead in Wisconsin: it is absolutely inalienable without the consent of both spouses and is therefore worthless to one spouse acting alone without the consent of the other.

There is no way to convey any interest in a jointly held spousal homestead in Wisconsin without both spouses'

consent except through court proceedings, such as a divorce, bankruptcy, or lien foreclosure. This requirement of spousal consent for the extrajudicial conveyance of any interest in jointly held homestead property is not a mere consequence of a property interest that becomes inoperative under federal law, as the court of appeals incorrectly determined. Elfelt, 163 Wis. 2d at 493, 497. Rather, the statutory requirement of spousal consent illustrates that the nature of the property interest owned by a spouse in a jointly held homestead is a limited interest that can only be alienated with the consent of both spouses or by court action.

Mr. Cooper's interest in the Coopers' spousal homestead is distinguishable from the joint bank account in National Bank, where the delinquent taxpayer had access to the entire amount without prior consent of his codepositors. A homestead held jointly by a husband and wife is of an entirely different nature than a joint tenancy between persons who are not married: no interest of a homestead held jointly by a husband and wife can be conveyed without the consent of both spouses, sec. 706.02(1)(f), Stats.; while joint tenants who are not married have the right to sell their individual interests and thereby sever the joint tenancy. Nelson v. Albrechtson, 93 Wis. 2d 552, 563, 287 N.W.2d 811

(1980) (citing Nichols v. Nichols, 43 Wis. 2d 346, 349, 168 N.W.2d 876 (1969)).

As Mr. Cooper would not be able to convey any interest of the jointly held spousal homestead without Mrs. Cooper's consent, the IRS, which merely steps into Mr. Cooper's shoes, also cannot convey any interest of the jointly held spousal homestead without either Mrs. Cooper's consent or court action. Due to the nature of Mr. Cooper's property interest under Wisconsin law, any conveyance of that interest by the IRS without Mrs. Cooper's consent and without court action is ineffective. Consequently, the Elfelts did not obtain and do not now own an interest in Mrs. Cooper's homestead.

We recognize that if the IRS had proceeded under I.R.C. § 7403 and brought a lien foreclosure action in district court, the IRS might validly have conveyed an interest in the Coopers' jointly held spousal homestead. But even under I.R.C. § 7403 the IRS would have to convince the court that such action would be equitable. See Rodgers, 461 U.S. at 709 (courts should exercise limited equitable discretion in I.R.C. § 7403 proceedings; I.R.C. § 7403 empowers a district court to order the sale of a family house in which a delinquent taxpayer has an interest, even

though a nondelinquent spouse also has a homestead interest in the house under state law).

As Mr. Cooper is deceased and because we hold that the IRS did not validly convey any interest in the homestead to the Elfelts, Mrs. Cooper now owns the property in fee simple absolute under her right of survivorship. We therefore remand this matter to the circuit court and direct that the court enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute.

By the Court.–The decision of the court of appeals is reversed, and the matter is remanded to the circuit court with directions to enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute.

No. 90-1326

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

JAMES M. ELFELT,
JOSEPH P. ELFELT,
ANTHONY J. ELFELT,
LAWRENCE W. ELFELT,
PAUL G. ELFELT,
DAVID C. ELFELT and
STEVEN M. ELFELT,
Plaintiffs-Respondents-
Cross Appellants,

v.

ALBINA COOPER,
Defendant-Appellant-
Cross Respondent,

DALE T. COOPER,
Defendant.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha county: CLAIR VOSS, Judge. *Affirmed in part, reversed in part and cause remanded with directions.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

ANDERSON, J. Albina Cooper appeals from a judgment declaring the respondents (the Elfelts) owners of an undivided one-half interest in Albina's home, ordering a partition of the property and determining rent due from Albina to the Elfelts. The Elfelts acquired their interest after the Internal Revenue Service (IRS) levied upon and sold Dale Cooper's equal interest in the home to satisfy his income tax arrears. The Elfelts cross-appeal and argue that Albina brought frivolous claims and defenses and refused to admit facts later proven at trial. The Elfelts also argue that Albina's appeal is frivolous. The Elfelts request attorney's fees for each of their claims. We hold that the Elfelts may receive rent and partition, and that Albina's claims, defenses and appeal were not frivolous. However, we remand for the trial court to make the necessary factual findings to determine whether it was reasonable for Albina to refuse to admit facts later proven at trial.

Dale Cooper and his wife, Albina, owned their homestead as joint tenants. Dale was delinquent in his income taxes, but Albina was not liable for any delinquent income taxes. The IRS placed a levy on Dale's interest in the property pursuant to 26 U.S.C. (I.R.C.) sec. 6331 (West Supp. 1989). After the period of redemption expired, the IRS sold Dale's interest to John and Stacy Elfelt by a quitclaim deed. They subsequently granted a quitclaim deed to their children. The children (the Elfelts) brought an action against Albina for rent and to partition the property. Dale died just before trial.

The issue at trial was whether the IRS complied with the statutory requirements in selling Dale's property interest. The jury found that the IRS did comply with the legal requirements. Therefore, the Elfelts had title, and the trial court granted the Elfelts' request for rent and partition.

Albina appeals and argues that because the IRS lacked the legal authority to sell Dale's interest in their homestead, the Elfelts do not have good title and they cannot receive rent or partition.[1] The Elfelts cross-appeal

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[1] State courts have the power to decide questions in a quiet title action although the conveyances were governed by federal law and were an exercise of federal

and claim that Albina made frivolous claims and defenses and they request attorney's fees. The Elfelts also claim that because Albina refused to admit facts later proven at trial, they should receive attorney's fees for proving those facts.

APPEAL

The first issue is whether I.R.C. sec. 6331 gave the IRS the legal authority to levy and sell Dale's equal interest in the homestead held in joint tenancy.[2] The jury's

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power. *Popp v. Eberlein*, 409 F.2d 309, 311 (7th Cir.), *cert. denied*, 396 U.S. 909 (1969).

[2] 26 U.S.C. (I.R.C.) sec. 6331, (West Supp. 1989) provides in relevant part:

> (a) Authority of Secretary.–If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. . . .

factual findings are not disputed on appeal. The application of a statute to an undisputed set of facts presents a question of law which this court reviews without deference to the trial court. *ParkBank-West v. Mueller,* 151 Wis.2d 476, 482, 444 N.W.2d 754, 757 (Ct. App. 1989). The IRS code provides that if any person does not pay income tax, a lien shall attach on "all property and rights to property" belonging to the person. I.R.C. sec. 6331(a). The language "all property and rights to property" is broad and reveals that Congress meant to reach every interest in property that a taxpayer may have. *United States v. National Bank of Commerce,* 472 U.S. 713, 719-20 (1985). Because a lien is not self-executing, affirmative action by the IRS is required. *Id.* There are two tools for collection: a lien-foreclosure suit pursuant to I.R.C sec. 7403 and a collection of unpaid

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> (b) Seizure and sale of property.–The term "levy" as used in this title includes the power of distraint and seizure by any means. . . . In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

tax by administrative levy, including the power to seize and sell, pursuant to I.R.C. sec. 6331.[3] *National Bank*, 472 U.S. at 720.

National Bank sets forth the appropriate analysis.[4] "'[O]nce it has been determined that state law

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[3] Section 71.91(6), Stats., is an administrative levy provision similar to I.R.C. sec. 6331. In Wisconsin, the state may collect tax arrears by levying and selling "any property belonging to that person."

Section 71.91(6)(b). The levying power in Wisconsin is broader than the IRS because in Wisconsin "[no] property of any person is exempt from levy and sale. . . ." Section 71.91(6)(f)6. By contrast, the IRS code provides exemptions to the administrative levy and sale. I.R.C. sec. 6334. A recent amendment to the IRS code exempts a taxpayer's principal residence from levies with a few exceptions. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, sec. 6236(c)(4)(A), 102 Stat. 3342, 3739. The amendment does not apply to levies before July 1, 1989. *Id.* at sec. 6236(h)(1), 102 Stat. at 3740-41.

[4] In footnote 10 of *United States v. National Bank of Commerce,* 472 U.S. 713, 726 (1985), the court limited its holding to property interests of joint bank accounts. The Court concluded that a codepositor has a state property interest which could be attached by an administrative levy because the codepositor has a right to withdraw funds. *Id.* at 724. The Court did not decide if other state created property interests were subject to an administrative levy. We find the general analysis persuasive as applied to

creates sufficient interests in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative', and the tax consequences thenceforth are dictated by federal law." *Id.* at 722, *quoting United States v. Bess,* 357 US 51, 56-57 (1958). Furthermore, "state law define[s] the nature of the taxpayer's interest in the property, but the state-law consequences of that definition are of no concern to the operation of the federal tax law." *National Bank,* 472 U.S. at 723. Because the tax consequences attach to "property" or "rights to property," the threshold question is whether Dale had "property" or "rights to property" under Wisconsin law.

Dale and Albina owned their homestead as joint tenants. Each of two or more joint tenants has an equal interest in the whole property for the duration of the tenancy. Section 700.17(2)(a), Stats. Joint tenants have the right to sell their shares or seek and obtain partition. *Nichols v. Nichols, 43* Wis.2d 346, 349, 168 N.W.2d 876, 878 (1969); *see also* sec. 842.02, Stats. A joint tenant, absent some prohibition of a specific nature, always has the power to sell his or her interest. *Lutzke v. Lutzke,* 122 Wis.2d 24,

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interest in real property and we will rely on *National Bank* for the analysis and application of the IRS code.

32, 361 N.W.2d 640, 644 (1985). Therefore, Dale's equal interest in their home was a "right to property" under Wisconsin law, and the federal tax consequences of I.R.C. sec. 6331 apply. Because homestead and joint tenancy property were not listed as a type of property exempted from federal seizure in I.R.C. sec. 6334, the federal tax consequences included seizing and selling Dale's right to the property. *See* I.R.C. sec. 6331; *see also* footnote 3. The restrictions accompanying homesteads and joint tenancies are state law consequences of the rights to the property. For example, a state law consequence of a property interest existing as a homestead is that a conveyance must contain both spouses' signatures. Section 706.02(1)(f), Stats. A state law consequence, such as the signature requirement, is inoperative and does not prevent the levy and sale of Dale's right to the property. *See National Bank,* 472 U.S. at 722-23. Furthermore, it has been held that state homestead exemptions do not prevent the IRS from levying Dale's right to the property. *See United States v. Hoffman,* 643 F. Supp. 346, 349 (E.D. Wis. 1986).

In *State Bank of Drummond v. Christophersen,* 93 Wis.2d 148, 157, 286 N.W.2d 547, 552 (1980), the Wisconsin Supreme Court held that a transaction is void if a joint tenant attempts to convey the entire interest without

the signature of the other joint tenant. *Drummond* does not prevent the conveyance in this case because only Dale's property interest, and not the entire property, was sold.

Albina argues that the IRS was without legal authority to seize and sell Dale's property interest in their homestead. She relies on language in *National Bank* which explicitly states that I.R.C. sec. 6331 is a provisional remedy which allows the IRS to levy on the property immediately and leave ownership disputes to be resolved in post-seizure administrative or judicial proceedings. *National Bank*, 472 U.S. at 728-31. She argues that because administrative proceedings were absent, the IRS had no authority to sell the property.

The language Albina relies upon is in the Supreme Court's discussion of the rights of third parties and whether or not the third parties' rights must be protected before the property is seized. *Id.* We conclude that the language does not limit the IRS's authority to sell the property after seizure pursuant to I.R.C. sec. 6331. The Supreme Court recognized that, although third parties' interests may be indirectly implicated in I.R.C. sec. 6331 actions, third parties' interests do not prevent the IRS from levying the property under I.R.C. sec. 6331. National Bank, 472 U.S. at 728-31. The Court pointed out that I.R.C. sec.

7403 is the tool which can adjudicate all interested parties' rights in one proceeding. Conversely, I.R.C. sec. 6331 is intended to reach only one party's interest. In such cases, I.R.C. sec. 6331 is an appropriate tool to collect delinquent taxes. *National Bank*, 472 U.S. at 728-31. Here, the IRS levied and sold only Dale's right to the property. Thus, I.R.C. sec. 6331 was the appropriate tool authorized by Congress to seize and sell Dale's rights to the property.

In the case where third parties' interests are inadvertently impaired and the IRS has chosen to proceed under I.R.C. sec. 6331, Congress provided a means to adjudicate those rights pursuant to I.R.C. secs. 6343(b) and 7426. These statutory remedies for third parties contemplate the sale of property before the rights are determined. *See National Bank*, 472 U.S. at 728. Thus, the burden was on Albina to invoke the appropriate statutory procedures to protect whatever interest was affected by the levy and sale.[5]

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[5] The dissent in *National Bank* interpreted the majority to hold that the only recourse for a third party claiming an interest in property levied upon pursuant to I.R.C. sec. 6331 is through I.R.C. secs. 6343(b) and 7426. One of the reasons the dissent criticized the majority was because the statute of limitations for such actions is only nine months. *See National Bank*, 472 U.S. at 736 (Powell,

Although the Court stated that I.R.C. sec. 6331 is provisional, it is provisional only because third parties' rights are not resolved. The fact that the code section is provisional does not prevent the IRS from doing what the IRS code specifically allows: seizing and selling the property. Neither the Court nor the code requires that an adjudication of third parties' interests occur before the explicit authority to sell the property is invoked.

The practical effect of Albina's argument is to require the IRS to proceed under I.R.C. sec. 7403, which provides for notice to and joinder of all parties whenever third parties have an interest in the levied property. The Court in *National Bank* rejected this argument. *National Bank*, 472 U.S. at 732-33.

Albina's second argument is that, although the constitutionality of I.R.C. sec. 6331 has been repeatedly upheld, it is nevertheless *per se* unconstitutional as applied to the facts of this case. She relies on *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), which holds that because a mortgagee has a legally protected property interest, he or she is therefore entitled, under the due process clause, to personal or mailed notice of a tax sale of

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J., dissenting).

the property. *Id.* at 798. Albina argues that her equal interest is analogous to a mortgagee's interest, and therefore because the Elfelts never proved she received notice the sale is *per se* unconstitutional.

Albina's constitutional argument must fail. In *Mennonite,* the tax sale altered the lien priorities and drastically diminished the value of the mortgagee's security interest. *Id.* The tax sale had the potential to nullify the mortgagee's interest. *Id.* Here, Albina does not have a lien on Dale's interest and her equal interest was not sold or diminished in value. She has the same interest after the sale that she did before the sale. Furthermore, in an I.R.C. sec. 7403 action in which a homestead was levied and sold, the Supreme Court stated that "if sec. 7403 allowed for the gratuitous confiscation of one person's property interests in order to satisfy another person's tax indebtedness, such a provision might pose significant difficulties under the Due Process Clause of the Fifth Amendment." *United States v. Rodgers,* 461 U.S. 677, 697 (1983). Here only Dale's interest was sold. Albina's interest was not confiscated to satisfy Dale's indebtedness. Thus, the IRS actions are not *per se* unconstitutional.

Albina's final argument is that a homestead is indivisible because the homestead cannot be conveyed

without the consent of the other party. Thus, Albina reasons that I.R.C. sec. 6335(c) mandates that the entire indivisible property be sold.[6]

A homestead can be divided. *See* sec. 706.02(1)(f), Stats. However, state law requires that a conveyance alienating any interest a married person may have in a homestead must be signed by both parties. *Id.* This limitation is a state law consequence of a property interest and it becomes inoperative to prevent an administrative levy. *See National Bank*, 472 U.S. at 722.

Thus, the IRS's actions are authorized by federal law. Because the jury found that the IRS complied with the statutory requirements of the seizure and sale, and

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[6] I.R.C. sec. 6335(c) states:

> Sale of Indivisible Property.–If any property liable to levy is not divisible, so as to enable the secretary by sale or part thereof to raise the whole amount of the (continued)
> tax and expenses, the whole of such property shall be sold.

Wisconsin has an identical provision. *See* sec. 71.91(6)(f)3, Stats.

this finding is not challenged on appeal, the Elfelts acquired title to one-half interest in the property. Once an interest in a joint tenancy is conveyed, the interest becomes a tenancy in common. *Nichols,* 43 Wis.2d at 349, 168 N.W.2d at 878. Tenants in common can sue for partition and rent. *See* sec. 700.23(3)(a), Stats.

The second issue is whether Albina's appeal is frivolous under Rule 809.25(3)(c), Stats. There are no cases directly on point. The special status that homesteads and joint tenancies receive by law support a good faith argument that homesteads and joint tenancies are to be treated differently under the federal tax law. We are unable to conclude that the legal issues in this appeal lacked any reasonable basis in law and equity or that it could not be supported by a good faith argument for an extension, modification or reversal of existing law. Thus, the appeal was not frivolous. *See* Rule 809.25(3).

In summary, in Albina's appeal, we affirm that portion of the judgment which ordered a partition of the property. We also affirm the finding that the Elfelts were entitled to rent from Albina. Finally, we conclude that Albina's appeal was not frivolous.

CROSS-APPEAL[7]

The first issue is whether the Elfelts are entitled to attorney's fees under sec. 804.12, Stats., incurred in proving facts Albina failed to admit. Section 804.12(3), provides that if a party fails to admit the truth of any matter under sec. 804.11, Stats., and if the other party proves the truth of the matter, the requesting party may receive reasonable expenses incurred in making the proof, including reasonable attorney's fees. The only exception relevant to this case is the one for a party failing to admit who had reasonable grounds to believe that he or she might prevail. Section 804.12(3).

The imposition of sanctions pursuant to sec. 804.12, Stats., is discretionary with the trial court. *See In re Estate of Glass,* 85 Wis.2d 126, 146-47, 270 N.W.2d 386, 396

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[7] The Elfelts argue that the trial court erred in determining the amount of rent Albina owed to the Elfelts. The trial court determined that the rent began accruing from the date of the jury verdict. The Elfelts argue that the amount should begin accruing on the date of the demand for rent. Albina agrees. *See* sec. 700.23(3)(a), Stats. Based upon Albina's confession of error and the statute we reverse the trial court's determination that rent should begin accruing from the date of the jury verdict.

(1978). The trial court summarily denied the Elfelts' request for attorney's fees and did not make any factual findings. The trial court did not address whether there were any reasonable grounds to deny the requests for admission. It is well established that a decision which requires the exercise of discretion and which on its face demonstrates no consideration of any of the factors on which the decision should be properly based constitutes an abuse of discretion as a matter of law. *Schmid v. Olsen,* 111 Wis.2d 228, 237, 330 N.W.2d 547, 552 (1983). However, if the reviewing court can conclude *ab initio* that there are facts of record which would support the trial court's decision had discretion been exercised on those facts, reversal is not automatic. *Id.*

After the Elfelts' motion for summary judgment was denied, the Elfelts requested that Albina admit that the IRS's actions were in "accordance with the laws of the United States." Albina denied the request. The jury subsequently found that the IRS complied with the legal requirements in selling Dale's rights to the property to the Elfelts.

The Elfelts argue that Albina's refusal to admit the facts was unreasonable based on two I.R.C. sections: (1) I.R.C. sec. 6339(b)(1), providing that the deed of the sale is prima facie evidence of the facts stated

therein; and (2) I.R.C. sec. 6340(b), providing that the Record of Seizure and Sale of Real Estate" is prima facie evidence of the facts therein. The seizure and sale of Dale's interest involved a deed and a "Record of Seizure and Sale of Real Estate. These documents state that the assessment against Dale was proper and that the statutory requirements in seizing and selling the interest were followed. The Elfelts argue that Albina's denial was unreasonable because Albina denied those facts despite the prima facie evidence of those documents' truth and because she failed to introduce any evidence disputing the facts stated in those documents.

We cannot conclude *ab initio* that the facts of record support the trial court's denial of attorney's fees and that Albina's denial was reasonable. Both parties argue over who had those documents and why there was a delay in getting them from the IRS. Albina argues that she did not have the proper documents necessary to make the admissions at the time of the request, but received them on the eve of the trial. The Elfelts claim that Albina knew of the quitclaim deed and the "Record of Seizure and Sale of Real Estate." Based on this unresolved record, we cannot conclude whether there were reasonable grounds to deny the requests for admission. Therefore, we remand for the trial court to make the necessary determinations.

The second issue is whether the trial court erred in denying the Elfelts' attorney's fees under sec. 814.025, Stats., on the grounds that Albina's claims and defenses were frivolous.

Section 814.025, Stats., provides that in order to find a proceeding frivolous, the trial court must find that the attorney knew, or should have known, that the action was without any reasonable basis in law and could not be supported by a good faith argument for an extension, modification or reversal of existing law. Whether the attorney knew or should have known that the claim was without reasonable basis in law presents a mixed question of law and fact. *Stoll v. Adrumsen,* 122 Wis.2d 503, 513, 362 N.W.2d 182, 187 (Ct. App. 1984). A determination of what a reasonable attorney would or should have known with regard to the facts requires the trial court to determine what those facts were. *Id.* at 513, 362 N.W.2d at 188. However, the legal significance of those findings presents a question of law. *Id.* We decide questions of law without deference to the trial court. *Id.* at 514, 362 N.W.2d at 188.

If the record is sufficient, we can decide as a matter of law whether a reasonable attorney should have known whether the action was without a proper basis in law. *See Richland County v. DHSS,* 146 Wis.2d 271, 275, 430

N.W.2d 374, 376 (Ct. App. 1988). Here, the record is sufficient for us to determine as a matter of law because Albina argued throughout the proceedings that the IRS was without legal authority to seize and sell Dale's equal interest in a homestead held in joint tenancy. This is a question of law and does not require that the trial court make factual findings.

The Elfelts argue that Albina ignored the plain meaning of I.R.C. secs. 6321 through 6340 which permit the IRS to sell property and interests in property through administrative procedures. However, this is a unique case because the facts involve joint tenancy, homestead and administrative levy and because there are no reported cases directly on this issue. The test is whether the party's position is so indefensible that it is frivolous and whether that party or its attorney should have known it. Stoll, 122 Wis.2d at 517, 362 N.W.2d at 189. There are no cases which explicitly reject Albina's arguments. Although the language of the IRS code is broad, it is defensible that the code did not authorize administrative seizures and sales in situations like the one before us.

In conclusion, the IRS had the legal authority to levy and sell Dale's equal interest in the homestead held in joint tenancy. The Elfelts, therefore, are entitled to rent

and partition. Furthermore, Albina's claims, defenses and appeal were not frivolous due to the unique facts of this case and the lack of precedent. However, we remand to the trial court to determine: (1) Whether Albina had any reasonable grounds to deny the requests for admissions. (2) The amount of rent due from Albina accruing from the date the Elfelts made their written demand for payment of rent.

By the Court.–Judgment affirmed in part, reversed in part and cause remanded with directions.

Recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT
WAUKESHA COUNTY

JAMES M. ELFELT, JOSEPH P. ELFELT, ANTHONY J. ELFELT, LAWRENCE W. ELFELT, PAUL G. ELFELT, DAVID C. ELFELT, and STEPHEN M. ELFELT,
Plaintiffs, Case No. 88-CV-0960

vs.

DALE T. COOPER and ALBINA COOPER,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above entitled matter having come on for a trial on April 17, 18 and 19, 1990, and having been tried before the Court, the Honorable Clair Voss, Circuit Judge presiding, and an advisory jury, and the advisory jury having rendered their verdict which is of record, wherein they find that the Internal Revenue Service complied with the legal requirements in selling to John and Stacey Elfelt all of Dale T. Cooper's interest in the real property located at 38050 Dolmar Park Road, Dousman, Wisconsin; and

Said matter having come on for a hearing on May 14, 1990, on the parties' motions after verdict; and

NOW, THEREFORE, upon all the records, minutes, and proceedings herein before held, I, the judge, do find and decide as follows:

FINDINGS OF FACT

1. That all the allegations of the plaintiffs' amended complaint are proven to be true.

2. That on June 25, 1986, the Internal Revenue Service sold to John Elfelt and Stacey Elfelt all right, title and interest of Dale T. Cooper and into the following described premises situated in Waukesha, Wisconsin:

> Lot 18, in Dolmar Park, a subdivision of part of the Northeast 1/4 of the Southeast 1/4 of Section 17, and the Northeast 1/4 and Southwest 1/4 of the Southwest 1/4 of Section 16, Town 6 North, Range 17 East, in the Town of Ottawa, Waukesha County, Wisconsin.

3. On January (sic) 25, 1986, Dale T. Cooper owned an undivided one-half (1/2) interest in joint tenancy with Albina Cooper in said property.

4. That the Internal Revenue Service complied with the legal requirements in selling to John and Stacey Elfelt all of Dale T. Cooper's interest in said property.

5. That Dale T. Cooper died on April 1, 1989.

6. That following expiration of the period allowed by law for redemption from said sale, on January 5, 1987, the Internal Revenue Service issued to John Elfelt and Stacey Elfelt a District Director's Quit Claim Deed conveying to them the interest of Dale T. Cooper in and to the above described premises, which Deed was recorded in the Office of the Waukesha County Register of Deeds on April 17, 1987 as Document Number 1417137.

7. That on January 31, 1987, John Elfelt and Stacey Elfelt, husband and wife, deeded their interest in the above described property to the plaintiffs, which Deed was recorded in the Office of the Waukesha County Register of Deeds on April 17, 1987 as Document Number 1417138.

8. That a partition of the premises cannot be made without prejudice to the owners of said property.

9. That defendant, Albina Cooper, has occupied said property continuously from January 1, 1987 to the date of trial to the exclusion of the defendants.

10. That from January 1, 1987 to the date of trial, said property has had a reasonable rental value of $625.00 per month.

11. That on January 1, 1987, plaintiffs made written demand upon defendant for a proportionate share of the reasonable rental value of said property, but defendant has not paid any rent to plaintiffs.

CONCLUSIONS OF LAW AND JUDGMENT

It is by the Court determined and adjudged as follows:

1. That the plaintiffs, James M. Elfelt, Joseph P. Elfelt, Anthony J. Elfelt, Lawrence W. Elfelt, Paul G. Elfelt, David C. Elfelt, and Stephen M. Elfelt, are the owners in fee simple of an undivided one-half (1/2) interest in the above described property.

2. That the defendant, Albina Cooper, is the owner in fee simple of an undivided one-half (1/2) interest in the above described property.

3. That all, and singular, the property above described shall be sold at public auction, in the County of Waukesha, by and under the direction of the

Sheriff of Waukesha County; that the Sheriff give notice of the time and place of the sale in the same manner as is required by law for sales of real estate upon execution; that the Sheriff, after said sale, shall deposit with the Clerk of this Court the proceeds of said sale and shall promptly report the sale to the Court, with a description of the land sold to the purchaser, the name of such purchaser and the price bid by him; that the Clerk shall hold the proceeds of sale until the sale is confirmed by the Court and shall be distributed by the Clerk in accordance with the Court's order of confirmation.

4. That any of the parties may become purchasers at the sale.

5. That after the confirmation of the sale of said property, the purchaser or purchasers at such sale, his or their heirs and assigns, shall be vested with all of the estate, title and interest of all the parties to this action and those claiming under them shall be let into possession of the property on production of the said Sheriff's Deed or a duly authenticated copy thereof, and that each and every of the parties to this action who may be in possession of the property described in such Deed and every other person who since the filing of such notice of the pendency of this action has come into possession of the same, or any part

thereof, under them or either or any of them, shall deliver to such grantee or grantees named in such Deed, his or their heirs or assigns, possession of such property as shall be described in such Deed or an authenticated copy thereof, and that a Writ of Assistance issue, if necessary, to secure possession.

6. That the defendant and all persons claiming under her, be hereby enjoined by committing waste upon said property, and from doing any other act that may impair the value of the property at any time between the date of this judgment and the date of such sale.

7. That the plaintiffs' costs of this action, in the sum of $912.25, plus any additional items of costs incurred by the plaintiffs to the date of sale as shall be approved by the court, are allowed by the Court and shall be deducted from the defendant's share of the proceeds of the sale and paid to plaintiffs' attorneys.

8. That the sum of $312.50 per month from April 19, 1990 to the date of sale shall be deducted from the defendant's portion of the sale proceeds and shall be paid to the plaintiffs as rent.

9. That if the defendant's share of the proceeds of said sale be insufficient to pay the amounts

aforesaid, judgment for such deficiency is hereby ordered to be separately rendered against defendant, Albina Cooper.

10. That the defendant's motion for judgment notwithstanding the verdict be and the same hereby is denied.

The Clerk of this Court will enter this judgment.

Dated this 23rd day of May, 1990.

BY THE COURT:

/s/ Clair Voss
Clair Voss
Circuit Court Judge

Judgment entered this 24th day of May, 1990.

/s/ Cynthia S. Ernst
Cynthia Ernst
Clerk of Courts

By: /s/ Delores Sheehan
Deputy Clerk

26 U.S.C. § 6321. Lien for taxes.

If an person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6331. Levy and distraint

(a) Authority of Secretary.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) **Seizure and sale of property.**

The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property (whether real or personal, tangible or intangible).

(c) **Successive seizures.**

Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

(d) **Requirement of notice before levy**

(1) **In general,** Levy may be made under subsection (a) upon the salary or wages or other property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his intention to make such levy.

(2) **10-day requirement.** The notice required under paragraph (1) shall be–

(A) given in person.

(B) left at the dwelling or usual place of business of such person, or

(C) sent by certified or registered mail to such person's last know address, no

less than 10 days before the day of levy.

(3) **Jeopardy.** Paragraph (1) shall not apply to a levy if the Secretary has made a finding under the last sentence of subsection (a) that the collection of tax is in jeopardy.

(e) **Continuing levy on salary and wages.**

(1) **Effect of levy.** The effect of a levy on salary or wages payable to or received by a taxpayer shall be continuous from the date such levy is first made until the liability out of which such levy arose is satisfied or becomes unenforceable by reason of lapse of time.

(2) **Release and notice of release.** With respect to a levy described in paragraph (1), the Secretary shall promptly release the levy when the liability out of which such levy arose is satisfied or becomes unenforceable by reason of lapse of time, and shall promptly notify the person upon whom such levy was made that such levy has ben released."

(f) **Cross references.**

(1) For provisions relating to jeopardy, see subchapter A of chapter 70.

(2) For proceedings applicable to sale of seized property, see section 6335.

26 U.S.C. § 6334. Property exempt from levy.

(a) **Enumeration.**

There shall be exempt from levy–

(1) **wearing apparel and school books.** Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family.

(2) **Fuel, provisions, furniture, and personal effects.** If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock and poultry of the taxpayer, as does not exceed $1,500 in value;

(3) **Books and tools of a trade, business, or profession.** So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $1,000 in value;

(4) **Unemployment benefits.** Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependent) under an unemployment compensation law of the United States, of any State, or of the District of Columbia or the Commonwealth of Puerto Rico;

(5) **Undelivered mail.** Mail, addressed to any person, which has not been delivered to the addressee.

(6) **Certain annuity and pension payments.** Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and

Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) Workmen's compensation. Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) Judgments for support of minor children. If the taxpayer is required by judgment of a court competent of jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

(9) Minimum exemption for wages, salary, and other income. Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any periods, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d).

(10) Certain service-connected disability payments. Any amount payable to an individual as a service-connected (within the meaning of section 101(16) of title 38, United States Code) disability benefit under–

(A) subchapter II, IV, or VI or chapter 11 of such title 38,

(B) subchapter I, II, or III of chapter 19 of such title 38 or

(C) chapter 21, 31, 32, 34, 35, 37, or 39 of such title 38.

(c) No other property exempt.

Notwithstanding any other law of the United States (including section 207 of the Social Security Act), no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

26 U.S.C. § 6335. Sale of seized property.

(a) Notice of seizure.

As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) Notice of sale.

The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the country wherein such

seizure is made, or, if there be no newspaper published or generally circulated in such country, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a) public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

(c) Sale of indivisible property.

If any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

(d) Manner and conditions of sale.

(1) In General.

(A) Determinations relating to minimum price. Before the sale of property seized by levy, the Secretary shall determine–

(i) a minimum price for which such property shall be sold (taking into account the expense of making the levy and conducting the sale, and

(ii) whether, on the basis of criteria prescribed by the Secretary, the purchase of such property by the United States at such minimum price would be in the best interest of the United States.

(B) Sale to highest bidder at or above minimum price. If, at the sale, one or more persons offer to purchase such property for not less than the

amount of the minimum price, the property shall be declared sold to the highest bidder.

(C) Property deemed sold to United States at minimum price in certain cases. If no person offers the amount of the minimum price for such property at the sale and the Secretary has determined that the purchase of such property by the United States would be in the best interest of the United States, the property shall be declared to be sold to the United States at such minimum price.

(D) Release to owner in other cases. If, at the sale, the property is not declared sold under subparagraph (B) or (C), the property shall be released to the owner thereof and the expense of the levy and sale shall be added to the amount of tax for the collection of which the levy was made. Any property released under this subparagraph shall remain subject to any lien imposed by subchapter C.

(2) Additional rules applicable to sale. The Secretary shall by regulations prescribe the manner and other conditions of the sale of property seized by levy. If one or more alternative methods or conditions are permitted by regulations, the Secretary shall select the alternative applicable to the sale. Such regulations shall provide:

(A) That the sale shall not be conducted in any manner other than–

(i) by public auction, or

(ii) by public sale under sealed bids.

(B) In the case of the seizure of several items of property, whether such items shall be offered separately, in groups, or in the

aggregate; and whether such property shall be offered both separately (or in groups) and in the aggregate, and sold under whichever method produces the highest aggregate amount.

(C) Whether the announcement of the minimum price determined by the Secretary may be delayed until the receipt of the highest bid.

(D) Whether payment in full shall be required at the time of acceptance of a bid, or whether a part of such payment may be deferred for such period (not to exceed 1 month) as may be determined by the Secretary to be appropriate.

(E) The extent to which methods (including advertising) in addition to those prescribed in subsection (b) may be used in giving notice of the sale.

(F) Under what circumstances the Secretary may adjourn the sale from time to time (but such adjournments shall not be for a period to exceed in all 1 month).

(3) **Payment of amount bid.** If payment in full is required at the time of acceptance of a bid and is not then and there paid, the Secretary shall forthwith proceed to again sell the property in the manner provided in this subsection. If the conditions of the sale permit part of the payment to be deferred, and if such part is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or such part thereof as has not been paid, together with interest at the rate of 6 percent per annum from the date of the sale; or, in the discretion of the Secretary, The sale may be declared by

the Secretary to be null and void for failure to make full payment of the purchase price and the property, may again be advertised and sold as provided in subsections (b) and (c) and this subsection. In the event of such readvertisement and sale any new purchaser shall received such property or rights to property, free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever, and the amount paid upon the bid price by such defaulting purchaser shall be forfeited.

(f) Stay of sale of seized property pending Tax Court decision.

For restrictions on sale of seized property pending Tax Court decision, see section 6863(b)(3).

26 U.S.C. § 6337. Redemption of property.

(a) Before sale.

Any person whose property has ben levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Secretary at any time prior to the sale thereof, and upon such payment the Secretary shall restore such property to him, and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

(b) Redemption of real estate after sale.

(1) Period. The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of

such property, at any time within 180 days after the sale thereof.

(2) **Price.** Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the country in which the property to be redeemed is situated, then to the Secretary, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

(c) Record.

When any lands sold are redeemed as provided in this section, the Secretary shall cause entry of the fact to be made upon the record mentioned in section 6340, and such entry shall be evidence of such redemption.

26 U.S.C. § 6338. Certificate of sale; deed of real property.

(a) Certificate of sale.

In case of property sold as provided in section 6335, the Secretary shall give to the purchaser a certificate of sale upon payment in full of the purchase price. In the case of real property, such certificate shall set forth the real property purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor.

(b) Deed to real property.

In the case of any real property sold as provided in section 6335, and not redeemed in the manner and within the time provided in section 6337, the Secretary shall

execute (in accordance with the laws of the State in which such real property is situated pertaining to sales of real property under execution) to the purchaser of such real property at such sale, upon his surrender of the certificate of sale, a deed of the real property so purchased by him, reciting the facts set forth in the certificate.

(c) **Real property purchased by United States.**

If real property is declared purchased by the United States at a sale pursuant to section 6335, the Secretary shall at the proper time execute a deed therefor, and without delay cause such deed to be duly recorded in the proper registry of deeds.

26 U.S.C. § 6339. **Legal effect of certificate of sale of personal property and deed of real property.**

(a) **Certificate of sale of property other than real property.**

In all cases of sale pursuant to section 6335 of property (other than real property), the certificate of such sale–

(1) **As evidence.** Shall be prima facie evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of his proceedings in making the sale; and

(2) **As conveyances.** Shall transfer to the purchaser all right, title, and interest of the party delinquent in and to the property sold; and

(3) **As authority for transfer of corporate stock.** If such property consists of stocks, shall be notice, when received, to any corporation, company, or

association of such transfer, and shall be authority to such corporation, company, or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not; and

(4) As receipts. If the subject of sale is securities or other evidences of debt, shall be a good and valid receipt to the person holding the same, as against any person holding or claiming to hold possession of such securities or other evidences of debt; and

(5) As authority for transfer of title to motor vehicle. If such property consists of a motor vehicle, shall be notice, when received, to any public official charged with the registration of title to motor vehicles, of such transfer and shall be authority to such official to record the transfer on his books and records in the same manner as if the certificates of tile to such motor vehicle were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

(b) **Deed of real property.**

In the case of the sale of real property pursuant to section 6335–

(1) Deed as evidence. The deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated; and

(2) Deed as conveyance of title. If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the

party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

(c) Effect of junior encumbrances.

A certificate of sale of personal property given or a deed to real property executed pursuant to section 6338 shall discharge such property from all liens, encumbrances, and titles over which the lien of the United States with respect to which the levy was made had priority.

(d) Cross references.

(1) For distribution of surplus proceeds, see section 6342(b)

(2) For judicial procedure with respect to surplus proceeds, see section 7426(a)(2)

26 U.S.C. § 6343. Authority to release levy and return property.

(b) Return of property.

If the Secretary determines that property has been wrongfully levied upon, it shall be lawful for the Secretary to return–

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from a sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of

9 months from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

26 U.S.C. § 7402. Jurisdiction of district courts.

(a) To issue orders, processes, and judgments.

The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs, and orders of injunction, and of the *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) To enforce summons.

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) For damages to United States officers or employees.

Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or employee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefore, in the district court of the United States, in the district wherein the party doing the injury may reside or shall be found.

(e) To quiet title.

The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

(f) General jurisdiction.

For general jurisdictions of the district courts of the United States in civil actions involving internal revenue, see section 1340 of title 28 of the United States Code.

26 U.S.C. § 7403. Action to enforce lien or to subject property to payment of tax.

(a) Filing.

In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or

liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

(b) Parties.

All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree.

The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and , in all cases where a claim or interest of the United State therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sales according to the findings of the court in respect to the interest of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, no exceeding the amount of such lien with expenses of sale, as the Secretary directs.

(d) Receivership.

In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

26 U.S.C. § 7426. Civil actions by persons other than taxpayers.

(a) Actions permitted.

(1) Wrongful levy. If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

(2) Surplus proceeds. If property has been sold pursuant to a levy, any person (other tan the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property junior to that of the United States and to be legally entitled to the surplus proceeds of such sale amy bring a civil action against the United States in a district court of the United States.

(3) Substituted sale proceeds. If property has been sold pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United States in district court of the United States.

(b) Adjudication.

The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) **Injunction.** If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit the enforcement of such levy or to prohibit such sale.

(2) **Recovery of Property.** If the court determines that such property has been wrongfully levied upon, the court may–

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) if such property was sold, grant a judgment for an amount not exceeding the greater of–

(i) the amount received by the United States from the sale of such property, or

(ii) The fair market value of such property immediately before the levy.

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(3) **Surplus proceeds.** If the court determines that the interest or lien of any party to an action

under this section was transferred to the proceeds of a sale of such property, the court may grant a judgment in an amount equal to all or any pat of the amount of the surplus proceeds of such sale.

(4) Substituted sale proceeds. If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

(c) Validity of assessment.

For purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid.

(d) Limitation on rights of action.

No action may be maintained against any officer o employee of the United States (or former officer or employee) or his personal representative, the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action was commenced upon proper service of process on the United States.

(e) Substitution of United States as party.

If an action, which could be brought against the United States under this section, is improperly brought against any officer or employee of the United States (or former officer or employee) or his personal representative, the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as

a party for such officer or employee as of the time such action was commenced upon proper service of process on

(f) Provision inapplicable.

The provisions of section 7422(a) (relating to prohibition of suit prior to filing claim for refund) shall not apply to actions under this section.

(g) Interest.

Interest shall be allowed at the overpayment rate established under section 6621–

(1) in the case of a judgment pursuant to subsection (b)(2)(B), from the date the Secretary or his delegate receives the money wrongfully levied upon to the date of payment of such judgment; and

(2) in the case of a judgment pursuant to subsection (b)(2)(C), from the date of the sale of the property wrongfully levied upon to the date of payment of such judgment.

(h) Cross reference.

For a period of limitation, see section 6532(c).

Wis. Stat. § 842.02 Partition; plaintiffs.

(1) A person having an interest in real property jointly or in common with others may sue for judgment partitioning such interest unless an action for partition is prohibited elsewhere in the statutes or by agreement between the parties for a period not to exceed 30 years.

(2) The plaintiff in his complaint may demand judgment of partition and, in the alternative, if partition is impossible, judicial sale of the land or interest, and division of the proceeds.

Wis. Stat. § 842.14 Judgment of partition. (1) If the court has determined that partition is proper under s. 842.07 or on adoption by the court of a report recommending partition without sale, the court may order or render judgment of partition which shall be conclusive on all the parties to the action and their legal representatives and on all persons claiming or to claim from such parties or persons or any of them, subsequent to the filing of the notice of the pendency of the action.

Wis. Stat. § 842.17 Interlocutory judgment of sale. (1) If the court finds that the land or any portion thereof is so situated that partition cannot be made without prejudice to the owners, and there are no tenants or lienholders, it may order the sheriff to sell the premises so situated at public auction.

(2)

Supreme Court, U.S.
FILED
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No.92-443

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

James M. Elfelt, Joseph P. Elfelt
Anthony J. Elfelt, Lawrence W. Elfelt,
Paul G. Elfelt, David C. Elfelt
and Steven M. Elfelt,

Petitioners

v.

Albina Cooper, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT FOR THE STATE
OF WISCONSIN

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Did the IRS have the legal authority to transfer ownership of respondent's husband's undivided one-half interest in Wisconsin homestead property by the use of administrative levy procedures in lieu of a judicial foreclosure proceeding?

2. Did the petitioner's parents receive, in a quit claim deed from the IRS, good title to respondent's husband's undivided one-half interest in Wisconsin homestead property without the respondent providing her consent to the sale and without the IRS providing notice to the respondent of the administrative sale of her husband's interest?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENT	6
I. THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT TURNS UPON ITS OWN FACTS, AND A RECENT STATUTORY CHANGE RENDERS THE DECISION'S IMPACT MINIMAL AND UNLIKELY TO AFFECT OTHER LITIGANTS	6
II. THE WISCONSIN SUPREME COURT DID NOT EXCEED ITS AUTHORITY IN HOLDING THAT THE IRS HAD NO AUTHORITY TO SELL MR. COOPER'S UNDIVIDED ONE-HALF INTEREST IN HOMESTEAD PROPERTY BY ADMINISTRATIVE LEVY	9
III. THE DECISION OF THE WISCONSIN SUPREME COURT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER FEDERAL COURTS OF APPEAL	11
A. The IRS Did Not Have the Legal Authority to Transfer Ownership of the Respondent's Husband's	

Property to the Petitioners' Parents in the Manner and Form Accomplished 11

B. The Wisconsin Supreme Court's Decision Does Not Conflict With Federal Court Decisions 16

IV. THE PETITIONERS' INTERPRETATION OF THE INTERNAL REVENUE CODE IN THIS CASE WOULD BE UNCONSTITUTIONAL AND IS THEREFORE PER SE UNREASONABLE 22

V. THE RESPONDENT'S HOMESTEAD PROPERTY WAS INDIVISIBLE ANDD THEREFORE TITLE COULS ONLY BE CONVEYED BY THE IRS IF IT SOLD THE WHOLE PROPERTY PURSUANT TO 26 U.S.C. §6335(C) 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Elfelt v. Cooper,
168 Wis. 2d 1016 (1992) 11, 13

Herndon v. United States,
501 F.2d 1219 (8th Cir. 1974) 20

In re Carlson,
580 F.2d 1365 (10th Cir. 1978) 25

Mennonite Board of Missions v. Adams,
462 U.S. 791 (1983) 24

Popp v. Eberlein,
409 F.2d 309 (7th Cir. 1969) 11

Rodriguez v. United States,
629 F.Supp. 333 (Northern
District Illinois 1986) 13, 15

State Bank of Drummond,
93 Wis. 2d 148, 286 N.W.2d 547 (1980) 27

United States v. National Bank of Commerce,
472 U.S. 713, 86 L.Ed.2d 565, 106
S. Ct. 219 (1985) 14, 15, 17-19, 24

United States v. Rodgers,
461 U.S. 677 (1983) 12,13, 16

STATUTES

26 U.S.C. §6331	2, 5, 13-15, 18, 23
26 U.S.C. §6332(e)	7
26 U.S.C. §6335(C)	25, 26
26 U.S.C. §7403	2, 12
§706.02(1)(f)	19, 26

MISCELLANEOUS

Technical and Miscellaneous Review Act of 1988, Pub. L. No. 100-647, §6236(c)(4)(A), 102 Stat. 3342, 3739, now codified at 26 U.S.C. §6332(a)(13) 6

STATEMENT OF THE CASE

This matter is before the Supreme Court on a Petition for Writ of Certiorari to the Wisconsin Supreme Court which, in a decision dated June 17, 1992, remanded this case to the Circuit Court with directions to enter judgment declaring Mrs. Cooper to be the sole owner of the property at issue in this action in fee simple absolute.

In 1963 Albina and Dale Cooper purchased property at 38050 Dolmar Park Road, Dousman, Wisconsin. Six years later, in 1969, a house was completed and the Cooper's moved in as husband and wife. They continued to reside there throughout their marriage until Mr. Cooper passed away in 1989. Albina Cooper, now age 71, has lived in the home for 23 years.

On January 11, 1985, the IRS filed a Notice of Lien against Dale Cooper's interest in the homestead property in the amount of $13,283.22, for unpaid income taxes owed solely by Dale Cooper. It is undisputed that Albina

Cooper was not liable for any taxes unpaid by her husband. On November 15, 1985, the IRS issued a Notice of Levy on the Cooper homestead for the unpaid income taxes owed by Dale Cooper. Thereafter, the IRS did not proceed under 26 U.S.C. §7403, which provides for judicial foreclosure of the property of delinquent tax payers. Instead, the IRS apparently assumed that administrative procedures provided by 26 U.S.C. §6331 authorized it to sell Mr. Cooper's interest in the homestead property without a judicial adjudication, and without notice to Albina or any other party with an interest in the subject property.

On June 25, 1986, the IRS conducted an administrative tax sale of Mr. Cooper's interest in the home. The successful bidders were John and Stacy Elfelt. On January 5, 1987, the IRS issued a quit claim deed for the undivided one-half interest of Dale Cooper to John and Stacy Elfelt. Subsequently, on January 31, 1987, the

senior Elfelts issued a quit claim deed to their seven sons, the petitioners in this action.

In March of 1988 the petitioners filed a Summons and Complaint in Waukesha County Circuit Court requesting the Court declare the petitioners owners of a one-half interest of the property with Mrs. Cooper as tenants in common, and requesting a forced sale partition of the property with one-half of the proceeds to go to the Elfelts plus rent alleged to be due and owing from Dale Cooper retroactive to January, 1987.

Dale Cooper died on April 1, 1989 while the action was still pending in the trial court. Albina Cooper subsequently filed a third-party complaint and counter-claim for quiet title, alleging that the IRS failed to follow certain procedures mandated by the revenue laws, thereby resulting in an invalid seizure and sale, and the issuance of an invalid quit claim deed to the purchasers, John and Stacy Elfelt.

The case was tried to an advisory jury on April 17, 1990. The Court reserved for itself the legal question of whether the IRS had the legal authority to sell Mr. Cooper's interest in the homestead in the manner and form accomplished. The jury was submitted one question:

> Did the Internal Revenue Service comply with the legal requirements in selling to John and Stacy Elfelt all of Dale T. Cooper's interest in the real property located at 38050 Dolmar Park Road, Dousman, Wisconsin?

The jury answered affirmatively and the respondent filed a motion for judgment notwithstanding the verdict, which was denied. The trial court entered judgment for the Elfelts, finding that the IRS had legally conveyed Dale Cooper's interest to the Elfelts, declaring the petitioners and respondent to be tenants in common, ordering a sheriff's sale of the property and requiring Mrs. Cooper to pay back rent to the Elfelts.

The Court of Appeals affirmed the trial court judgment. The Wisconsin Supreme Court granted Mrs. Cooper's Petition for Review and reversed the lower courts. The Wisconsin Supreme Court held that without Mrs. Cooper's consent, and in the absence of court action, §6331 does not give the IRS the authority to sell Mr. Cooper's interest in the homestead. In view of Mrs. Cooper's counter-claim, the Wisconsin Supreme Court considered the matter a quiet title action and held that the quit claim deed from the IRS did not convey any interest in the property to the Elfelts. Because Mrs. Cooper held the property as a joint tenant with right of survivorship together with her now deceased husband, the Wisconsin Supreme Court remanded to the trial court with directions to enter judgment declaring the petitioner to be the sole owner of the property in fee simple absolute.

ARGUMENT

I. THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT TURNS UPON ITS OWN FACTS, AND A RECENT STATUTORY CHANGE RENDERS THE DECISION'S IMPACT MINIMAL AND UNLIKELY TO AFFECT OTHER LITIGANTS.

This case is not worthy of review by this Court because the Wisconsin Supreme Court decision will probably affect no other litigants. The decision of the Wisconsin Supreme Court is based on a peculiar factual scenario which, because of a change in federal statutory law, is unlikely to ever occur again after July 1, 1989. A recent amendment to the IRS Code exempts a taxpayer's principle residence from levy, with very few exceptions. *See Technical and Miscellaneous Review Act of 1988*, Pub. L. No. 100-647, §6236(c)(4)(A), 102 Stat. 3342, 3739, now

codified at 26 U.S.C. §6332(a)(13). The only exceptions require a written approval at the highest levels of the IRS or a finding that tax collection is in jeopardy. 26 U.S.C. §6332(e)[1]. The amendment thus precludes the unfettered exercise of discretion by low level bureaucrats that occurred in this case by prohibiting such an administrative levy and sale of homestead property after July 1, 1989. Since the IRS has been precluded now for more than two years from taking the sort of action it took in the respondent's case, it is highly unlikely the Wisconsin Supreme Court decision will affect any other litigants. A decision by this Court determining the application of a

---

[1] *See also*, Senate Finance Committee testimony of David C. Keating explaining the modifications of levy and sale procedures, March 19, 1984, CIS 85:S361-3, p. 76 (distraint is most sweeping action affecting taxpayers; should only be done in such circumstances after careful review at district director level and represent an agency decision, rather than low level employee decision.)

statute to facts which are unlikely to recur would be a mere esoteric exercise.

In fact, the petitioners, in their brief in opposition to review by the Wisconsin Supreme Court, conceded that this case had little precedential value:

> The Elfelts agree that the question presented is a novel one, as far as state courts are concerned. However, it will have little, if any, state-wide impact, nor is it likely to recur unless resolved by the Supreme Court.

(Response to Petition for Review by the Wisconsin Supreme Court, page 2.) While the Wisconsin Supreme Court nevertheless chose to review the Court of Appeals decision in this case, this Court, of necessity, must limit its review to a very few important cases with substantial national impact.

II. THE WISCONSIN SUPREME COURT DID NOT EXCEED ITS AUTHORITY IN HOLDING THAT THE IRS HAD NO AUTHORITY TO SELL MR. COOPER'S UNDIVIDED ONE-HALF INTEREST IN HOMESTEAD PROPERTY BY ADMINISTRATIVE LEVY.

The petitioner mistakenly believes the Wisconsin Supreme Court decision conflicts with the Supremacy Clause of the United States Constitution. The petitioner apparently believes the Wisconsin Supreme Court decision in this case constitutes state regulation or interference with supreme federal law. The petitioner reads much more into the ruling than the court's decision deserves.

The Wisconsin Supreme Court did not "void an act" of the Internal Revenue Service or otherwise abrogate the Internal Revenue Code. The Wisconsin court did not order the IRS to return the proceeds of the improper administrative sale to Dale's estate. The court merely

exercised it's proper authority as a state court to resolve a property dispute in a quiet title action.

The petitioners purchased under a quit claim deed, and thereby assumed the risk that their claim to title may later prove invalid. The Wisconsin court decision simply determined the validity of that claim to title and thus resolved a controversy between two private parties over title to land within this state. The Wisconsin court explained:

> As stated by the U.S. Court of Appeals for the Seventh Circuit in a case concerning federal tax sales of parcels of land located in Wisconsin:
>
> > Controversies over title to land within a state are particularly appropriate for determination by the courts of that state. We find nothing anywhere to imply that state courts lack power to decide such questions in a quiet title action on the ground that the conveyances were governed by federal law and were an exercise of federal power.

Popp v. Eberlein, 409 F.2d 309, 311 (7th Cir. 1969). *Elfelt v. Cooper*, 168 Wis. 2d 1016-17, (1992); (App. p. 111). The petitioners sought a remedy in state court and cannot now escape scrutiny of the infirmity of their claim to title.

III. THE DECISION OF THE WISCONSIN SUPREME COURT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER FEDERAL COURTS OF APPEAL.

A. The IRS Did Not Have the Legal Authority to Transfer Ownership of the Respondent's Husband's Property to the Petitioners' Parents in the Manner and Form Accomplished.

Notably, the Wisconsin Supreme Court did **not** hold that the IRS could never transfer ownership of a property holder's interest in homestead property. Rather, the Wisconsin court simply held that the procedures relied upon by the IRS in this case did not give the agency the

authority to sell Mr. Cooper's interest in the homestead in the absence of court action or consent by Mrs. Cooper. In so holding, the Wisconsin court first analyzed the methods available to the IRS for the collection of taxes.

In general, there are three different procedures by which the IRS may enforce its tax liens. First, the government may sue the delinquent tax payer for taxes due and thereby obtain a judgment enforceable as any other creditor's judgment. *United States v. Rodgers*, 461 U.S. 677, 682 (1983).

Second, the IRS can choose to proceed directly under 26 U.S.C. §7403 which involves a judicial foreclosure proceeding. However, that statute requires "all persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto." *Id.* Had the IRS chosen this method to collect Mr. Cooper's unpaid tax, Mrs. Cooper would have been a party to the action and she would have had an opportunity

to present to the court equitable reasons for denying a sale of her husband's interest in the homestead property. Again, the Wisconsin Supreme Court explained:

> We recognize that if the IRS had proceeded under I.R.C. §7403 and brought a lien foreclosure action in district court, the IRS might validly have conveyed an interest in the Coopers' jointly held spousal homestead. But even under I.R.C. §7403 the IRS would have to convince the court that such action would be equitable. *See, Rodgers*, 461 U.S. at 709.

Elfelt v. Cooper, 168 Wis. 2d 1008 (1992); (App. p. 123).

A third method for the IRS to enforce a tax lien is set forth in 26 U.S.C. §6331. Under that section, the IRS can choose to initially proceed administratively with a levy procedure to accomplish an interim seizure of the possessory interest in the property pending adjudication of the ownership rights to the property. But the administrative levy procedure is only a provisional remedy. *Rodriguez v. United States*, 629 F.Supp. 333, 334 (Northern District Illinois 1986). A levy action, unlike a §7403

judicial foreclosure proceeding, does not determine any roprietary rights to the property. It merely protects the government's interest so that the rights to property may later be determined in a post-seizure proceeding. *United States v. National Bank of Commerce*, 472 U.S. 713, 731, 86 L.Ed.2d 565, 106 S. Ct. 219 (1985).

This Court in *National Bank of Commerce*, in an effort to clarify the limits of administrative levy procedure stated:

> We now make explicit that §6331 is a provisional remedy, which does not determine the rights of third parties.

Id. at 731. This distinction is especially important when a non-taxpayer third party has an interest in the seized property, as in this case. The IRS cannot defeat the rights of an innocent third party by proceeding with an administrative levy. As this Court explained:

> Congress thus balances the interest of the government in the speedy collection of taxes against the interests of any claimants to the

> property, and reconciled those interests by permitting the IRS to levy on the assets at once, leaving ownership disputes to be resolved in a post-seizure administrative or judicial proceeding.

Id. at 729.

No post-seizure hearings were conducted before the IRS "sold" Dale Cooper's interest to the petitioners' parents. By proceeding under §6331 the IRS did no more than freeze the status quo to protect the government's interest. The use of an administrative levy does no more than "perfect" the government's security interest in the tax lien. *Rodriguez v. United States, supra* at 40. Absent any court adjudication of ownership rights to the property, the IRS simply had no authority to sell any interest of Dale Cooper in the family homestead without first conducting post-seizure hearings to determine the rights of any third-parties, including the respondent, Albina Cooper. *See, United States v. National Bank of Commerce, supra* at 731.

Accordingly, the Wisconsin Supreme Court

correctly held that the IRS improperly sold Mr. Cooper's interest in the family homestead property before the ownership rights to the property were lawfully determined.

B. The Wisconsin Supreme Court's Decision Does Not Conflict With Federal Court Decisions.

The Wisconsin Supreme Court carefully discussed, analyzed, and applied all relevant federal cases and decisions of this Court in determining the validity of the purported title acquired by the petitioners' parents in the administrative tax sale.

The Wisconsin Supreme Court decision does not conflict with this Court's holding in *United States v. Rodgers*, 461 U.S. 677 (1983) which involved a judicial foreclosure proceeding. This Court in *Rodgers* held **only** that a federal district court is empowered to order the sale of a family home in which a delinquent taxpayer shared an interest. But this Court specifically noted that a federal court may refuse a sale in the exercise of equitable

discretion in individual cases by balancing the governments' interest in tax collection against the possibility that innocent third parties will be unduly harmed. *Id.* at 709. In this case, the IRS did not permit a court that exercise of discretion when it purported to administratively sell Mr. Cooper's interest.

The Wisconsin Supreme Court did **not** hold, as the petitioners claim, that state homestead property is exempt from forced sale. Rather, the court simply held that the IRS could not obtain by administrative action greater authority than Mr. Cooper himself possessed and that he could not have sold his interest in the homestead to another without court action or Mrs. Cooper's consent. 168 Wis. 2d at 1023 (App. p. 122-23).

Neither does the Wisconsin Supreme Court decision conflict with this Court's decision in *National Bank*. This Court specifically limited the application of its ruling in that case:

> We stress the narrow nature of our holding. By finding that the right to withdraw funds from a joint bank account is a right to property subject to administrative levy under §6331, we express no opinion concerning the federal characterization of other kinds of state-law created forms of joint ownership. This case concerns the right to levy only upon joint bank accounts.

National Bank of Commerce, 472 U.S. at 726, n.10.

The Wisconsin Court discerned the obvious distinction between Mr. Cooper's interest in the family homestead and that of the owners of the joint bank account in *National Bank*, where the delinquent taxpayer had easy and immediate access to the entire amount on deposit without the consent of his co-depositors. 168 Wis. 2d at 1022 (App. p. 121-22).

Following this Court's direction in *National Bank*, the Wisconsin court first looked to state law to determine the nature and existence of Mr. Cooper's property right in the homestead. Once that was determined, the court correctly noted that state law consequences are inoperative

and that tax consequences thenceforth are dictated by federal law. The court followed the well-established principle that the IRS steps into the taxpayer's shoes and acquires only those rights the taxpayer himself possessed. 168 Wis. 2d at 1020 (App. p. 116), citing *National Bank*, 472 U.S. at 725.

Under Wisconsin state law, the nature of homestead property held in joint tenancy by husband and wife is such that it is inalienable without the consent of both spouses. §706.02(1)(f), Wis. Stats. One spouse may not convey any interest in the property without either the consent of the other spouse or a court judgment permitting a division of their interests. The Wisconsin Supreme Court thus concluded:

> As Mr. Cooper would not be able to convey any interest of the jointly held spousal homestead without Mrs. Cooper's consent, the IRS, which merely steps into Mr. Cooper's shoes, also cannot convey any interest of the jointly held spousal homestead without either Mrs. Cooper's

> consent **or court action**. Due to the nature of Mr. Cooper's property interest under Wisconsin law, any conveyance of that interest by the IRS without Mrs. Cooper's consent and without court action is ineffective. Consequently, the Elfelts did not obtain and do not now own an interest in Mrs. Cooper's homestead. (emphasis added)

168 Wis. 2d at 1023 (App. p. 122-23). Thus, the Wisconsin Supreme Court followed the reasoning of this Court in determining the nature of Mr. Cooper's interest and the affect of federal law upon that interest by holding the IRS acquired no more interest in the property than Dale Cooper himself possessed.

Finally, contrary to the Petitioners' assertion, the Wisconsin Supreme Court decision does not conflict with *Herndon v. United States*, 501 F.2d 1219 (8th Cir. 1974). In *Herndon*, the wife of a delinquent taxpayer brought an action, before the tax sale, to enjoin the IRS from selling the homestead property which was titled **solely** in her husband's name. The only issue in that case was:

> whether the plaintiff can assert whatever homestead rights she has under Arkansas law and the facts of this case to preclude the United States from selling the real property owned solely by her husband.

501 F.2d at 1220.

The plaintiff did not own the homestead property as a joint tenant in her own name or in tenancy by the entirety.[2] Instead, under Arkansas homestead law, she apparently held a contingent property interest. She did not own any interest in the property which could be diminished in value by an IRS sale.

Moreover, the Eighth Circuit pointed out that at best the IRS could sell only the husband's real estate subject to the wife's rights under the Arkansas homestead statute, and noted that a buyer at a tax sale may acquire

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[2]The government conceded that had the plaintiff and her husband held the real property as tenants by the entirety under Arkansas law, the IRS would have been precluded from attaching the property in the first instance. 501 F.2d at 1220-21.

a clouded title which may be insufficient to defeat the interests of the delinquent taxpayer's wife. *Id.* at 1223. The Eight Circuit court, however, did not have to decide the issue facing the Wisconsin Supreme Court in this case: the status of a claim to title acquired by a buyer at an administrative tax sale.

By purchasing homestead property at an administrative sale, the Elfelts accepted a large risk. In return they mistakenly hoped to obtain a half-interest in valuable Wisconsin lake country property at an enormous discount. To the Elfelts the lesson of this case is simple: *caveat emptor.*

IV. THE PETITIONERS' INTERPRETATION OF THE INTERNAL REVENUE CODE IN THIS CASE WOULD BE UNCONSTITUTIONAL AND IS THEREFORE PER SE UNREASONABLE.

Although the Wisconsin Supreme Court did not reach the respondent's constitutional arguments, the

petitioners have nevertheless raised the issue in their brief. The petitioners continue to mischaracterize the respondent's constitutional argument as an attack on the facial constitutionality of the administrative levy procedure.

The respondent does not argue that the levy and distraint procedures of §6331 are inherently unconstitutional. Rather, the respondent submits that §6331 is simply inapplicable to her case. A contrary interpretation of that statute would be per se unreasonable, as Mrs. Cooper's constitutional due process right to proper notice would be violated. §6331 requires no notice to innocent third parties with an interest in the seized property. That congress made no provision for notice to an innocent non-liable spouse that her right to the lifetime enjoyment of her homestead property could be jeopardized by administrative seizure and sale of the interest of a delinquent spouse indicates that such a

method was never intended to be employed in Mrs. Cooper's situation.

Unlike the innocent co-depositor of the joint account levied upon in *National Bank*, Mrs. Cooper's property was adversely affected by the administrative sale. Her right of survivorship was extinguished by the administrative sale. This diminution in the value of her interest without any requirement of due process notice by the IRS would be unconstitutional, *see*, *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795-800 (1983).

Thus, while the administrative levy procedures are not intrinsically unconstitutional, they would certainly be unconstitutional in their application to Mrs. Cooper's case if they are interpreted as being suitable here.

V. THE RESPONDENT'S HOMESTEAD PROPERTY WAS INDIVISIBLE AND THEREFORE TITLE COULD ONLY BE CONVEYED BY THE IRS IF

IT SOLD THE WHOLE PROPERTY PURSUANT TO 26 U.S.C. §6335(C).

The Wisconsin Supreme Court did not reach the respondent's argument that under §6335(c) the Cooper homestead property was indivisible and therefore the IRS should have sold the entire homestead, not just Mr. Cooper's interest. Nevertheless, the respondent again asserts here that the administrative sale of only Mr. Cooper's interest in the property to the Elfelts was invalid as contrary to the Internal Revenue Code.

Whatever interest the IRS acquires, whether by judicial foreclosure or provisional possessory interest by administrative levy, can be no greater than that of the taxpayer himself. *In re Carlson*, 580 F.2d 1365, 1369 (10th Cir. 1978). As discussed earlier, under Wisconsin law, homestead property held by husband and wife in joint tenancy has unique characteristics which make it indivisible unless with the consent of both spouses. *See*

§706.02(1))f), Wis. Stats. Therefore, at best the IRS could obtain only Dale Cooper's indivisible interest in the homestead which could not be sold without Mrs. Cooper's consent. There is no question that Mr. Cooper could not have unilaterally sold his undivided one-half interest to Mr. Elfelt and left Albina Cooper with an uninvited bedfellow to intrude upon the joint tenancy she formally enjoyed with her husband. Likewise, the purported conveyance to the Elfelts by the IRS was as void as if Dale himself had tried to sell to them without Albina's signature.

Therefore, because a husband/wife joint tenancy in homestead property is indivisible, the entire Cooper property should have been sold pursuant to §6335(c), rather than just Dale Cooper's indivisible one-half interest. Section 6335(c) of the Code, concerning the sale of indivisible property provides:

> c). Sale of indivisible property. If any property liable to levy is not divisible, so as to enable the secretary by sale of part thereof to raise the whole amount of the tax and expenses, the whole of such property **shall** be sold. (emphasis added).

Since the IRS did not offer for sale the entire Cooper property, the purported sale of Dale Cooper's one-half interest to the Elfelts is void. *State Bank of Drummond*, 93 Wis. 2d 148, 157, 286 N.W.2d 547 (1980).

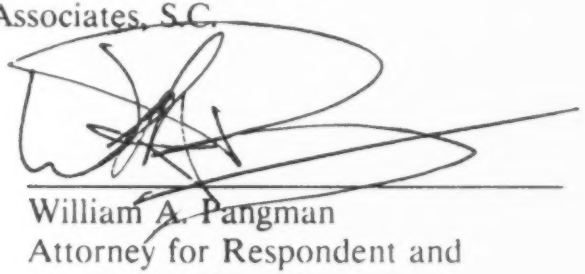
CONCLUSION

For all of the foregoing reasons respondent respectfully requests this Court deny this Petition for Writ of Certiorari. The Wisconsin Supreme Court correctly held that the petitioners may not enhance their interests in the property beyond the terms under which they allegedly acquired them in a quit claim deed and, to their unfortunate dismay, that deed has proven to be invalid. It is finally time to put to an end this protracted litigation

over property on which a 71 year old widow expects and deserves to live out her remaining years.

Respectfully submitted,

Law Offices of
WILLIAM A. PANGMAN
& Associates, S.C.



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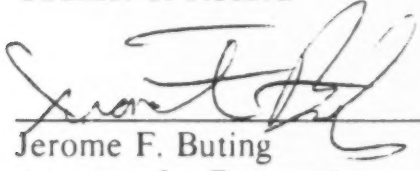

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PUBLISHER'S NOTE:

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Pages 29 thru 100

No. 90-1326

STATE OF WISCONSIN : IN SUPREME COURT

James M. Elfelt, Joseph P. Elfelt, Anthony J. Elfelt, Lawrence W. Elfelt, Paul G. Elfelt, David C. Elfelt, and Steven M. Elfelt,

Plaintiffs-Respondents-Cross Appellants,

v.

Albina Cooper,

Defendant-Appellant-Cross Respondent-Petitioner,

Dale Cooper,

Defendant.

REVIEW of a decision of the Court of Appeals. *Reversed and remanded.*

LOUIS J. CECI, J. This case is before the court on a petition for review of a published decision of the court of appeals, *Elfelt v. Cooper*, 163 Wis. 2d 484, 471 N.W.2d 303 (Ct. App. 1991). The court of appeals affirmed the judgment of the circuit court for Waukesha

County, Clair Voss, Circuit Judge, which declared, after a jury trial, that the plaintiffs (the Elfelts) were owners of an undivided one-half interest in the home of the defendant Albina Cooper (Mrs. Cooper) as tenants in common. The judgment ordered a sheriff's sale of the property and determined an amount of rent due from Mrs. Cooper to the Elfelts.

The issue presented for review is whether §6331 of the Internal Revenue Code, 26 U.S.C. §6331 (I.R.C. §6331),[1] gives the Internal Revenue Service (IRS) the

---

1 I.R.C. §6331 provides in relevant part:

§6331. Levy and distraint

(a) Authority of Secretary

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such

authority to sell Dale Cooper's (Mr. Cooper) undivided one-half interest in Mr. and Mrs. Cooper's homestead held in joint tenancy. We hold that without Mrs. Cooper's consent, and in the absence of court action, I.R.C. §6331 does not give the IRS the authority to sell Mr. Cooper's interest in the homestead, and we therefore reverse the court of appeals and remand to the circuit court with directions to enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute.

The facts are as follows. In 1963, the Coopers purchased the property at 38050 Dolmar Park Road,

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tax. . . .

(b) Seizure and sale of property

The term "levy" as used in this title includes the power of distraint and seizure by any means. . . . In an case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

Dousman, Wisconsin, as husband and wife.[2] In 1969, construction of a home on the property was completed, and the Coopers moved in. As of the time the briefs in this case were filed, Mrs. Cooper was age 70 and had lived in the homestead for over 21 years.

On January 11, 1985, the IRS filed a lien notice against the real estate of Mr. Cooper in Waukesha County. The lien was in the amount of $13,283.22 and was for unpaid income taxes for the year 1982. It is undisputed that Mrs. Cooper was not liable for any taxes unpaid by Mr. Cooper. On November 15, 1985, after Mr. Cooper did not pay the amount in dispute, the IRS mailed notice to Mr. Cooper that the IRS had seized Mr.

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[2] The property is more particularly described as:

Lot 18 in Dolmar Park, a subdivision of part of the NE 1/4 of the SE 1/4 of Section 17, and the NW 1/4 and the SW 1/4 of the SW 1/4 of Section 16, in Township number 6N, Range 17 East, in the town of Ottawa, Waukesha County, Wisconsin.

Cooper's interest in the homestead on Dolmar Park Road. The Coopers continued to live in the home after the seizure.

On June 25, 1986, the IRS conducted a tax sale of Mr. Cooper's interest in the home. The successful bidders were John and Stacey Elfelt. On January 1, 1987, John Elfelt made a written demand upon Mrs. Cooper for a proportionate share of the reasonable rental value of the property. On January 5, 1987, the IRS district director issued a quitclaim deed for the interest of Mr. Cooper to John and Stacey Elfelt. John and Stacey Elfelt issued a quitclaim deed to their seven sons, the plaintiffs in this matter.

On March 28, 1988, the Elfelts filed a summons and complaint, which was later amended, requesting that the court declare the Elfelts owners of an undivided one-half interest in the property with Mrs. Cooper as tenants in common, requesting a partition of the property by its

sale with one-half of the proceeds to go to the Elfelts, plus rent in the amount of one-half the reasonable rental value of the property subsequent to January 1, 1987. The Coopers both filed *pro se* motions to dismiss. After a hearing on March 13, 1989, the circuit court denied the Coopers' motions to dismiss. On April 1, 1989, Mr. Cooper died.

Mrs. Cooper filed a *pro se* answer and a motion to dismiss on April 25, 1989. The Elfelts responded with a motion for summary judgment. Mrs. Cooper retained counsel, and, after a hearing, the circuit court denied both parties' motions.

On September 6, 1989, Mrs. Cooper filed a third-party summons and complaint, an amended answer, affirmative defenses, and a counterclaim for quiet title. The third-party complaint was dismissed by stipulation of the parties. The amended answer and affirmative defenses alleged that the IRS failed to follow certain procedures

mandated by the I.R.C., that the seizure and sale was invalid, and that the quitclaim deed to John and Stacey Elfelt was therefore invalid.

The case was finally tried in April, 1990, to an advisory jury. The court reserved for itself the legal question of whether the IRS had the legal authority to sell Mr. Cooper's interest in the homestead in the manner and form accomplished. The jury was asked to answer one verdict question:

> Did the Internal Revenue Service comply with the legal requirements in selling to John and Stacey Elfelt all of Dale T. Cooper's interest in the real property located at 38050 Dolmar Park Road, Dousman, Wisconsin?

The jury's answer was "They (the Internal Revenue Service) did comply." Mrs. Cooper filed a motion for judgment notwithstanding the verdict, which was denied.

The court entered judgment for the Elfelts, finding that the IRS had legally sold Mr. Cooper's interest in the homestead to the Elfelts; declaring the Elfelts and Mrs. Cooper to be tenants in common, each owning in fee simple an undivided one-half interest in the property; ordering a sheriff's sale to partition the property; and ordering Mrs. Cooper to pay rent to the Elfelts.

The court of appeals affirmed the circuit court judgment and remanded for further findings. *Elfelt*, 163 Wis. 2d at 501-502. We granted Mrs. Cooper's petition for review.

The issue presented by this case, whether I.R.C. §6331 gives the IRS the authority to sell Mr. Cooper's undivided one-half interest in Mr. and Mrs. Cooper's homestead, involves the application of a statute to an undisputed set of facts. Statutory interpretation is a question of law which we review without deference to the lower courts. *Pulsfus Farms v. Town of Leeds*, 149 Wis. 2d

797, 803-04, 440 N.W.2d 329 (1989). The jury's verdict in this case, which was advisory only, found that the IRS had complied with the legal requirements in selling Mr. Cooper's interest to John and Stacey Elfelt. We do not review that verdict.

Mrs. Cooper argues that the IRS did not have the authority to transfer ownership of Mr. Cooper's ownership interest in the Coopers' homestead to the Elfelts in the manner and form accomplished: that because the property was a jointly held homestead, it may only be sold with Mrs. Cooper's consent or by a court order in the absence of Mrs. Cooper's consent. Mrs. Cooper also argues that homestead property is indivisible and that therefore, under I.R.C. §6335, it was improper to sell Mr. Cooper's interest without selling the property in its entirety. Finally, Mrs. Cooper argues that I.R.C. §6331 is unconstitutional as applied because it does not require that the IRS give

notice to all parties having an interest in property before the property is sold.

The Elfelts respond that the IRS did have the authority, under I.R.C. §§6331, 6335, 6338 and 6339, to sell Mr. Cooper's undivided one-half interest in the homestead without Mrs. Cooper's consent. In addition, the Elfelts argue that Mrs. Cooper was given remedies by I.R.C. §§6337, 6343, and 7426 that she failed to use, that the constitutionality of I.R.C. §6331 has long been settled, and that state court is not the proper forum for Mrs. Cooper's arguments.

We first note that the state court was a proper forum for this action and for Mrs. Cooper's defense to the action. The Elfelts, not Mrs. Cooper, commenced this action in the state court, seeking to enforce whatever interest they obtained from the IRS, seeking rent from Mr. and Mrs. Cooper, and seeking to have the home sold. The Elfelts should not now complain about Mrs. Cooper

presenting her defenses to the action in a forum that the Elfelts chose. In addition, due to Mrs. Cooper's counterclaim, we view this as a quiet title action. As stated by the U.S. Court of Appeals for the 7th Circuit in a case concerning federal tax sales of parcels of land located in Wisconsin:

> Controversies over title to land within a state are particularly appropriate for determination by the courts of that state. We find nothing anywhere to imply that state courts lack power to decide such questions in a quiet title action on the ground that the conveyances were governed by federal law and were an exercise of federal power.

Popp v. Eberlein, 409 F.2d 309, 311 (7th Cir. 1969). This controversy is properly in the state court system.

The I.R.C. provides the IRS at least three methods of enforcing collection of unpaid taxes. First, the government may sue for the unpaid amount and, if it

obtains a judgment, may exercise the usual rights of a judgment creditor. *United States v. Rodgers*, 461 U.S. 677, 682 (1983) (citing I.R.C. §§6502(a), 7401, and 7402(a)).

A second method is a lien foreclosure suit, authorized by I.R.C. §7403. The suit is a civil action brought in federal district court "to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability." I.R.C. §7403(a). Pursuant to I.R.C. §7403(b), "[a]ll persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto." The suit is a plenary action which requires the court to "adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property." I.R.C. §7403(c).

A third method that the IRS has for enforcing collection of unpaid taxes is the administrative levy, authorized by I.R.C. §6331. Under I.R.C. §6331, the IRS may levy upon and sell the property of a delinquent taxpayer in order to satisfy the tax liability of that tax payer. As opposed to the plenary nature of a lien foreclosure suit, the levy and distraint authorized by I.R.C. §6331 is only a provisional method that typically does not require judicial intervention. *United States v. National Bank of Commerce*, 472 U.S. 713, 720 (1985). In addition, "§6331, unlike §7403, does not 'implicate the rights of third parties,' because an administrative levy, unlike a judicial lien-foreclosure action, does not determine the ownership rights to the property." *Id.* at 731. If parties other than the delinquent taxpayer claim rights in the levied property, they may assert those rights in a postseizure administrative or judicial proceeding under I.R.C. §6343 or §7426. *Id.* at 728-29. Parties proceeding

under I.R.C. §§6343 and 7426 have nine months from the time of the levy to assert their property rights in the levied property. *Id.* at 736 (Powell, J., dissenting). In addition, property that is sold after it is levied upon may be redeemed by the property owners or any person having an interest therein at any time within 180 days after the sale of the property. I.R.C. §6337(b).

Mrs. Cooper did not avail herself of the procedures provided in I.R.C. §§6337(b), 6343, or 7426. If she had, this case would probably not be before us today. Instead, Mrs. Cooper argues that the IRS did not have the authority to sell Mr. Cooper's interest in the homestead property without Mrs. Cooper's consent and that the sale is, therefore, invalid. We agree.[3] In applying the I.R.C.,

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[3]Accordingly, we do not reach Mrs. Cooper's argument under I.R.C. §6335(c) that the property was indivisible and that therefore the IRS should have sold the entire homestead, not just Mr. Cooper's interest. As we find that the IRS did not have the authority to sell Mr. Cooper's interest in the property by administrative sale without Mrs.

Cooper's consent, we need not reach the Elfelts' argument that Mrs. Cooper failed to use the remedies provided to her by I.R.C. §§6337, 6343, and 7426.

We also do not reach Mrs. Cooper's constitutional arguments. Although the U.S. Supreme Court has stated that "[t]he constitutionality of the levy procedure, of course, 'has long been settled,'" *National Bank*, 472 U.S. at 721 (citations omitted), we are doubtful of the constitutionality of the actions of the IRS in this case. If we were not to reverse the court of appeals, the IRS's actions would have led to Mrs. Cooper's no longer having a right of survivorship in her spousal homestead, thereby greatly diminishing the value of her property interest. The court of appeals was incorrect when it stated that "[Mrs. Cooper] has the same interest after the sale that she did before the sale." *Elfelt*, 163 Wis. 2d at 496. Before the sale, Mrs. Cooper had an equal undivided jointly held interest in the whole of the homestead with Mr. Cooper, with a right of survivorship. After the sale, she had an interest in one-half of the property as a tenant in common, with no right o fsurvivorship. This diminution in the value of her property interest, without any requirement that she be given adequate notice by the IRS, puts the application of I.R.C. §6331 into serious constitutional doubt. *See Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795-800 (1983) (Prior to an action that will affect an interest in life, liberty, or property protected by the due process clause, a state must provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mere notice by publication is not sufficient when interested parties can be

state law determines the nature of the legal interest which the taxpayer had in the homestead property. *National Bank*, 472 U.S. at 722. This is because the I.R.C. does not create any property rights, but merely attaches federally defined consequences to rights which are created under state law. *Id.* Once state law has been used to determine the nature and existence of a property interest, further state law is inoperative, and the tax consequences thenceforth are dictated by federal law. *Id.* (citing *United States v. Bess*, 357 U.S. 51, 56-57 (1958)). In a levy proceeding, the IRS "'steps into the taxpayer's shoes' . . . [and] acquires whatever rights the taxpayer himself possesses." *Id.* at 725 (citations omitted).

In *National Bank*, the delinquent taxpayer was a codepositor in two jointly held bank accounts. *Id.* at 716. Relevant state law provisions, as well as the taxpayer's

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notified by more effective means such as personal service or mailed notice.).

contract with the bank, gave the taxpayer the unqualified right to withdraw the full amounts on deposit in the joint accounts without notice to his codepositors. *Id.* at 723 The Court stated:

> '[I]t is inconceivable that Congress . . . intended to prohibit the Government from levying on that which is plainly accessible to the delinquent taxpayer-depositor.' . . . The taxpayer's right to withdraw is analogous in this sense to the IRS's right to levy on the property and secure the funds. Both actions are similarly provisional and subject to a later claim by a codepositor that the money in fact belongs to him or her.

Id. at 726 (citations and footnote omitted). In a footnote to the above quote, the Court stated:

> We stress the narrow nature of our holding. By finding that the right to withdraw funds from a joint bank account is a right to property subject to

> administrative levy under §6331, we express no opinion concerning the federal characterization of other kinds of state-law created forms of joint ownership. This case concerns the right to levy only upon joint bank accounts.

Id. at 726 n.10

Following *National Bank*, we must first look to state law to determine the nature and existence of Mr. Cooper's property right in the homestead. Once that is determined, further state law consequences are inoperative, and we must turn to federal law. We bear in mind that the IRS cannot gain an interest superior to that which Mr. Cooper himself held.

Under Wisconsin law, the nature of homestead property held in joint tenancy between husband and wife is such that it is indivisible by one spouse without the

consent of the other. Sec. 706.02(1)(f), Stats.[4] The policy objectives of the homestead statute have been long recognized as laudable, providing to each spouse absolutely inalienable rights:

> The policy of the statute indicated is not to give the wife a mere personal right for her personal benefit which she may waive, or be estopped by her conduct from insisting upon, but to protect the home for the benefit of the family and every member of it,- a beneficent policy of the highest character, calling for a broad, liberal application of the statute so as to carry it out, fully, in letter and spirit. If it should be held that the homestead

---

[4]Sec. 706.02(1)(f), Stats., provides in relevant part: **706.02 Formal requisites.** (1) Transactions under s. 706.01(1) shall not be valid unless evidenced by a conveyance which:

. . .

(f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01(7) . . . .

> right is a mere privilege which the wife may waive, or which may be lost under the rules of equitable estoppel, a very efficient way would be open to evade and nullify the statute. Such right is placed high above the reach of any dangers by the absolute disability to alienate the homestead in any manner, except by a joint conveyance of some kind, signed by the husband and wife. The disability of the husband to otherwise covey the homestead is as complete as if it were not alienable at all, and of the wife to otherwise consent to such alienation, as if she were a minor.

Cumps v. Kiyo, 104 Wis. 656, 662, 80 N.W. 937 (1899). While the above-quoted language is dated, it illustrates the nature of the property right that a spouse owns in a homestead in Wisconsin: it is absolutely inalienable without the consent of both spouses and is therefore worthless to one spouse acting alone without the consent of the other.

There is no way to convey any interest in a jointly held spousal homestead in Wisconsin without both spouses' consent except through court proceedings, such as a divorce, bankruptcy, or lien foreclosure. This requirement of spousal consent for the extrajudicial conveyance of any interest in jointly held homestead property is not a mere consequence of a property interest that becomes inoperative under federal law, as the court of appeals incorrectly determined. *Elfelt*, 163 Wis. 2d at 493, 497. Rather, the statutory requirement of spousal consent illustrates that the nature of the property interest owned by a spouse in a jointly held homestead is a limited interest that can only be alienated with the consent of both spouses or by court action.

Mr. Cooper's interest in the Coopers' spousal homestead is distinguishable from the joint bank account in *National Bank*, where the delinquent taxpayer had access to the entire amount without prior consent of his

codepositors. A homestead held jointly by a husband and wife is of an entirely different nature than a joint tenancy between persons who are not married: no interest of a homestead held jointly by a husband and wife can be conveyed without the consent of both spouses, sec. 706.02(1)(f), Stats.; while joint tenants who are not married have the right to sell their individual interests and thereby sever the joint tenancy. *Nelson v. Albrechtson*, 93 Wis. 2d 552, 563, 287 N.W.2d 811 (1980) (citing *Nichols v. Nichols* 43 Wis. 2d 346, 349, 168 N.W.2d 876 (1969)).

As Mr. Cooper would not be able to convey any interest of the jointly held spousal homestead without Mrs. Cooper's consent, the IRS, which merely steps into Mr. Cooper's shoes, also cannot convey any interest of the jointly held spousal homestead without either Mrs. Cooper's consent or court action. Due to the nature of Mr. Cooper's property interest under Wisconsin law, any conveyance of that interest by the IRS without Mrs.

Cooper's consent and without court action is in ineffective. Consequently, the Elfelts did not obtain and do not now own an interest in Mrs. Cooper's homestead.

We recognize that if the IRS had proceeded under I.R.C. §7403 and brought a lien foreclosure action in district court, the IRS might validly have conveyed an interest in the Coopers' jointly held spousal homestead. But even under I.R.C. §7403 the IRS would have to convince the court that such action would be equitable. *See Rodgers,* 461 U.S. at 709 (courts should exercise limited equitable discretion in I.R.C. §7403 proceedings; I.R.C. §7403 empowers a district court to order the sale of a family house in which a delinquent taxpayer has an interest, even though a nondelinquent spouse also has a homestead interest in the house under state law).

As Mr. Cooper is deceased and because we hold that the IRS did not validly convey any interest in the homestead to the Elfelts, Mrs. Cooper now owns the

property in fee simple absolute under her right of survivorship. We therefore remand this matter to the circuit court and direct that the court enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute.

By the Court. - The decision of the court of appeals is reversed, and the matter is remanded to the circuit court with directions to enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute.

Supreme Court, U.S.
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(3)

No. 92-443

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

James M. Elfelt, Joseph P. Elfelt
Anthony J. Elfelt, Lawrence W. Elfelt,
Paul G. Elfelt, David C. Elfelt
and Steven M. Elfelt,

Petitioners

v.

Albina Cooper, Respondent

on Writ of Certiorari to the Supreme Court for
the State of Wisconsin

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

		PAGE
ARGUMENT		1
I.	THE 1988 AMENDMENT TO THE INTERNAL REVENUE CODE DOES NOT AFFECT THE SIGNIFICANT NATIONAL IMPACT OF THE QUESTIONS PRESENTED TO THIS COURT FOR REVIEW.	1
II.	THE WISCONSIN SUPREME DID NOT HAVE THE JURISDICTIONAL AUTHORITY TO VOID AN ACT OF THE INTERNAL REVENUE SERVICE.	7
III.	THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS WITH THE INTERNAL REVENUE CODE AND RELEVANT FEDERAL COURT DECISIONS.	9
IV.	THE ADMINISTRATIVE LEVY PROCEDURES, AS APPLIED, ARE CONSTITUTIONAL.	11
V.	RESPONDENT MISCONSTRUES SECTION 6335(C) OF THE INTERNAL REVENUE CODE.	13
CONCLUSION		15
APPENDIX		18

TABLE OF AUTHORITIES

CASES	PAGE
Elfelt v. Cooper, 168 Wis. 2d 1008, 485 N.W.2d 56 (1992)	7, 8, 9, 12
Herndon v. United States, 501 F.2d 1219 (8th Cir. 1974)	11
McAndrews v. Belknap, 141 F.2d 111 (6th Cir. 1944)	14, 15
Popp v. Eberlein, 409 F. 2d 309 (7th Cir. 1969)	8
Rodriguez v. United States, 629 F. Supp. 333 (N.D. Ill. 1986)	9
United States v. Bachman, 584 F. Supp. 1002 (S.D. Iowa, 1984)	5
United States v. National Bank of Commerce, 472 U.S. 713 (1985)	9

CONSTITUTIONAL PROVISIONS	PAGE
Article VI of the United States Constitution	8, 16
Article XVI of the amendments to the United States Constitution	16

STATUTES	PAGE
26 U.S.C. § 6321	14
26 U.S.C. § 6331	2, 9, 10, 14
26 U.S.C. § 6332	14
26 U.S.C. § 6334	1
26 U.S.C. § 6334(a)(13)	2, 3
26 U.S.C. § 6334(e)	2
26 U.S.C. § 6335(c)	13, 14
26 U.S.C. § 7402(a)	9
26 U.S.C. § 7403	9
§ 706.02(1)(f) of the Wisconsin Statutes	7

ARGUMENT

I. THE 1988 AMENDMENT TO THE INTERNAL REVENUE CODE DOES NOT AFFECT THE SIGNIFICANT NATIONAL IMPACT OF THE QUESTIONS PRESENTED TO THIS COURT FOR REVIEW.

Respondent argues that the amendments to 26 U.S.C. § 6334[1], which enumerates property exempt from levy, renders the impact of any review by this Court minimal and unlikely to affect other litigants. (Respondent's Brief in Opposition at 6-8.) Respondent argues that because of the amendment, which was effective June 30, 1989, an administrative sale of a principal residence by the Internal Revenue Service is unlikely to ever occur again.

The amendment to § 6334 of the Internal Revenue Code added subsections (a)(13) and (e) which provide:

> There shall be exempt from levy–
>
> . . . .
>
> (13) **Principal residence exempt in absence of certain approval or jeopardy.** Except to

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[1] Respondent's Brief in Opposition incorrectly identifies the codification as 26 U.S.C. § 6332(a)(13).

> the extent provided in subsection (e), the principal residence of the taxpayer (within the meaning of § 1034).
>
> . . . .
>
> (e) **Levy allowed on principal residence in case of jeopardy or certain approval.** Property described in subsection (a)(13) shall not be exempt from levy if–
>
> (1) a District Director or Assistant District Director of the Internal Revenue Service personally approves (in writing) the levy of such property, or
>
> (2) the Secretary finds that the collection of tax is in jeopardy.

Since the enactment of 26 U.S.C. § 6334(a)(13), the Internal Revenue Service in Wisconsin has continued to use the administrative seizure and sale provisions of the Internal Revenue Code, Sections 6331-6339, to satisfy tax liabilities of taxpayers. The IRS has administratively seized and sold jointly-held principal residences and homesteads in Wisconsin on numerous occasions, with the written approval of the District Director or Assistant District Director of the Milwaukee District pursuant to 26 U.S.C. § 6334(e), and intends to do so in the future. (Statement of Ursula Kordasiewicz-Wastian, Chief of the Special Procedures Staff of the Milwaukee District of the Internal Revenue Service, reproduced in the Reply Appendix at 101.)

Respondent attempts to mislead the Court in her implication that an administrative sale of a taxpayer's homestead is now prohibited. On the contrary, had the respondent's husband's interest in his jointly held homestead property been seized on or after July 1, 1989, either the IRS District Director or Assistant District Director could have provided the required written approval to use essentially the same administrative seizure and sale collection method which was used in 1985.

Homestead property has been administratively seized and sold since 26 U.S.C. § 6334(a)(13) took effect. The IRS intends to continue to use this administrative collection tool against homestead property. It is therefore abundantly clear that a decision by this Court will not be a "mere esoteric exercise", (Respondent's Brief in Opposition at 8), but will be a vitally significant determination of how federal statutes apply to facts which have occurred since July 1, 1989, and are most assuredly bound to recur. These facts will recur in Wisconsin and will likely recur in every state with homestead laws, giving cause for further litigation.

This case is packed with precedential value and substantial national impact, the respondent's assertions notwithstanding. The likelihood of similar litigation concerning validity of a purchaser's interest reaching both

federal and state courts is especially high, given the fact that at least twenty-seven states have homestead spousal consent laws similar to Wisconsin's.[2] Indeed, the United States District Court of Iowa noted the possibility of the very issue that is presently before this Court.

> The court feels that the Government may well be hard-pressed to find a buyer willing to purchase the equitable interest of Mr. Bachman, in the homestead which, in all likelihood, would be sold without the consent of Mrs. Bachman, and then attempt to collect on his purchased interest when the homestead is sold or passed through Mrs. Bachman's

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[2] Alabama Code § 6-10-3; Alaska Statutes § 34.15.010; Arizona Revised Statutes § 33-452; Arkansas Code § 18-12-403; California Civil Code §§ 5125, 5127; Colorado Revised Statutes § 38-41-202; Florida Const. Art. 10, § 4(c); Idaho Code § 55-1006; Illinois Revised Stats. § 110 para. 12-904; Kansas Const., Art. 15 § 9; Kentucky Revised Stats. § 427.100; Michigan Compiled Laws Annotated §§ 557.201, 557.203; Minnesota Stats. Ann. § 507.02; Mississippi Code § 89-1-29; Missouri Revised Stats. § 513.475; Montana Code Annotated § 70-32-301, 302; Nebraska Revised Stats. §§ 115.040, 123.230; New Hampshire Revised Stats. Ann. c. 480, § 5-a; New Mexico Stats. § 40-3-13; North Carolina Const., Art. X, § 2(4); North Dakota Century Code § 47-18-05; Oklahoma Stats. § 16-4; South Dakota Codified Laws § 43-31-17; Utah Code Annotated § 78-23-4(4); Vermont Statutes Annotated § 27-141; Washington Revised Code § 6.13.060; Wyoming Stats. § 34-2-121.

> estate. *The validity of the purchaser's interest may well be challenged as having failed to comply with Sec. 561.13.*[3] *United States v. Bachman*, 584 F. Supp. 1002, 1005 (S.D. Iowa 1984). (Emphasis added.)

The court in *Bachman*, gave no indication as to what the outcome of such a challenge might be. However, the issue is before this Court precisely because in this case, the IRS was *not* hard-pressed to find a buyer willing to purchase an undivided one-half interest in homestead property. It also stands to reason that the issue of alienation of *one* spouse's interest in jointly held homestead property by administrative seizure and sale without both spouse's consent is likely to revisit this Court, unless review is granted.

Respondent also attempts to mislead this Court into believing that the petitioners' conceded in their Brief In Opposition to Review by the Wisconsin Supreme Court that this case had little precedential value. (Respondent's Brief In Opposition at 8.) The respondent quotes a portion of

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[3] Iowa law prevents either spouse from conveying his or her interest, either voluntarily or involuntarily, for the benefit of creditors or for any other reason without the approval of the other spouse. *United States v. Bachman*, *supra* at 1004.

the petitioner's filing in the Wisconsin Supreme Court, but quotes it out of context. The petitioners stated in their Response to the Petition for Review by the Wisconsin Supreme Court:

> The Elfelts agree that the question presented is a novel one, *as far as state courts are concerned*. However, it will have little, if any, statewide impact, nor is it likely to recur unless resolved by the [Wisconsin] Supreme Court. *A prudent joint tenant who finds herself in a situation similar to Albina would invoke the statutory procedures set forth in Sections 6343(b) and 7426 of the Internal Revenue Code to protect their interest.* (Response to Petition for Review filed in the Wisconsin Supreme Court at 2. Emphasis added.)

Had the Wisconsin Supreme Court correctly decided the issues presented to it, it would have had little precedential value. However, the decision of the Wisconsin Supreme Court will now have significant nationwide impact and is likely to be cited as precedential authority in both federal and state courts, unless this Court grants the Petition for Writ of Certiorari.

II. THE WISCONSIN SUPREME COURT DID NOT HAVE THE JURISDICTIONAL AUTHORITY TO VOID AN ACT OF THE INTERNAL REVENUE SERVICE.

Respondent argues that the Wisconsin Supreme Court did not "void an act" of the Internal Revenue Service or otherwise abrogate the Internal Revenue Code. (Respondent's Brief in Opposition at 9.) However, the Wisconsin Supreme Court certainly did "void an act" of the Internal Revenue Service. The Wisconsin Supreme Court held that the IRS had no authority to sell an undivided one-half interest in homestead property held in joint tenancy. The Wisconsin Supreme Court cited § 706.02(1)(f) of the Wisconsin Statutes and stated, "There is no way to convey any interest in a jointly-held spousal homestead in Wisconsin without both spouses' consent except through court proceedings, such as a divorce, bankruptcy, or lien foreclosure." *Elfelt v. Cooper*, 168 Wis. 2d 1008, 1021-22, 485 N.W.2d 56 (1992); Appendix at 115-117. The Wisconsin Supreme Court also stated, "we hold that the IRS did not validly convey any interest in the homestead to the Elfelts." *Id.* at 1023; Appendix at 119. The Wisconsin Supreme Court held that the District Director's Quit Claim Deed was invalid because it was not consented to by the

respondent. It, therefore, clearly did void an act of the Internal Revenue Service.

The Wisconsin Supreme Court and the respondent rely on *Popp v. Eberlein*, 409 F. 2d 309 (7th Cir. 1969) in stating that the state court did have the jurisdictional authority to invalidate the IRS sale. *Elfelt v. Cooper, supra* at 1016-17; Appendix at 109; Respondent's Brief In Opposition at 10. However, what the Wisconsin Supreme Court and respondent have overlooked is that the Court of Appeals in *Popp* specifically cited Article VI of the United States Constitution and stated that "[t]he state court was bound to apply federal law in deciding the dispute." *Popp v. Eberlein, supra* at 311. The petitioners submit that the Wisconsin Supreme Court only had the jurisdictional authority to *apply* federal law in determining the consequences of the administrative sale of the property rights of Mr. Cooper created under Wisconsin law. However, the petitioners further submit that the Wisconsin Supreme Court did not have the jurisdictional authority to refuse to apply the clear and unambiguous authority granted to the IRS by the Internal Revenue Code by applying state law, rather than federal law, to determine the IRS' authority.

III. THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS WITH THE INTERNAL REVENUE CODE AND RELEVANT FEDERAL COURT DECISIONS.

The Wisconsin Supreme Court held that the only way the IRS might validly have conveyed an interest in the Coopers' jointly-held spousal homestead was to proceed under 26 U.S.C. § 7403. *Elfelt v. Cooper*, 168 Wis. 2d 1008, 1023, 485 N.W.2d 56 (1992); Appendix at 118. However, the court apparently overlooked 26 U.S.C. § 7402(a) which states in relevant part, "The remedies hereby provided are *in addition to and not exclusive of* any and all other remedies of the United States in such courts *or otherwise* to enforce such laws." (Emphasis added.) Petitioners have been unable to locate any court decision, federal or state, which has held that § 7403, in any situation, is exclusive of the administrative sale provisions of Sections 6331-6339.

Respondent argues that the administrative levy procedure is only a provisional remedy which does not determine the rights of third parties. (Respondent's Brief In Opposition at 13-16.) Respondent cites *United States v. National Bank of Commerce*, 472 U.S. 713 (1985) and *Rodriguez v. United States*, 629 F. Supp. 333 (N.D. Ill. 1986). While it is true that in those cases the courts held that §

6331 is a provisional remedy, which does not determine the rights of third parties, nothing in those decisions held that the IRS was precluded from selling an undivided interest in property pursuant to the plain and unambiguous language of § 6335 following the provisional remedy of the levy pursuant to § 6331. 26 U.S.C. § 6339(b) sets forth the legal effect of the deed of real property sold pursuant to § 6335.

> In the case of the sale of real property pursuant to § 6335-
>
> . . . .
>
> (2) **Deed as conveyance of title.** If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

It is true that the administrative levy and sale by the IRS did not determine the rights of any third parties in the property. That determination was left to be decided in this action and it was correctly decided by the trial court and the Wisconsin Court of Appeals that the respondent's rights were as the owner of an undivided one-half interest in the property which was subject to partition.

Contrary to respondent's arguments, the Wisconsin Supreme Court's decision *does* conflict with the Eighth Circuit Court of Appeals decision in *Herndon v. United States*, 501 F.2d 1219 (8th Cir. 1974). The Wisconsin Supreme Court, went beyond applying Wisconsin law to determine the *nature* of the property right that a spouse owns in a homestead in Wisconsin. It also relied on Wisconsin law, rather than federal law, to determine the *consequences* attached to the property right. However, *Herndon* held "that even if state laws do create a property interest pursuant to a homestead exemption law, the United States can still levy upon that property." *Herndon v. United States, supra* at 1221.

IV. THE ADMINISTRATIVE LEVY PROCEDURES, AS APPLIED, ARE CONSTITUTIONAL.

Petitioners only addressed the constitutionality of the administrative levy procedures because, even though the Wisconsin Supreme Court stated that it did not reach Mrs. Cooper's constitutional arguments, it then proceeded to state its reasons why it was doubtful of the constitutionality

of the actions of the IRS in this case. *Elfelt v. Cooper, supra* at 1019 n. 3; Appendix at 111-12.[4]

The record in this case does not support the Wisconsin Supreme Court's comment that the respondent was not given adequate notice by the IRS. The respondent does not take issue with the petitioners' statement in their Petition for Writ of Certiorari that the parties never litigated the issue of whether or not Mrs. Cooper received actual notice of the levy and sale, nor with the statement that, nevertheless, Mrs. Cooper did have actual knowledge of the levy and sale.

---

[4] Petitioners fail to understand why respondent believes that they have mischaracterized the respondent's constitutional argument as an attack on the facial constitutionality of the administrative levy procedure. (See Respondent's Brief In Opposition at 23.) Petitioners never mentioned in the Petition for Writ of Certiorari what the respondent's constitutional argument was. (See Petition for Writ of Certiorari at 38-41.) The petitioners' heading to the section in the Petition for Writ of Certiorari regarding the constitutional arguments states, "The administrative levy procedures, *as applied*, are constitutional." (Emphasis added.)

V. RESPONDENT MISCONSTRUES SECTION 6335(C) OF THE INTERNAL REVENUE CODE.

26 U.S.C. § 6335(c) provides:

> If any property liable to levy is not divisible, so as to enable the secretary by sale of part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

Respondent argues that the real estate owned by Mr. and Mrs. Cooper was not divisible and, therefore, since the Internal Revenue Service did not sell both of their interests in the property, the sale was invalid. The respondent misconstrues § 6335(c).

To determine what Congress intended when it referred to whether or not property is divisible, one need only look to the language of § 6335(c) itself. Property liable to levy is not divisible when it does not "enable the secretary by sale of a part thereof to raise the whole amount of the tax and expenses." If the IRS can raise the whole amount of the tax and expenses, § 6335(c) dictates that only part thereof be sold. In this case, the sale of Mr. Cooper's part of the real estate did enable the secretary to raise the whole amount of the tax and expenses. Therefore, the IRS was not required to sell the whole property as contended by respondent.

It must be noted that § 6335(c) only uses the term "property". Congress did not use the phrase "property and rights to property" as it did in other sections of the Code. *See* 26 U.S.C. §§ 6321, 6331 and 6332. The petitioners submit that in § 6335(c) Congress was referring to whether or not the "property" could be sold in parcels to satisfy the tax.

The case of *McAndrews v. Belknap*, 141 F.2d 111 (6th Cir. 1944) involved an action to quiet title instituted by the purchaser from the United States of two parcels of land which had been sold to the United States for taxes due. One of the arguments was that the sale was improper in that there were not two separate offers for the sale of two tracts of land pursuant to what was at that time § 3701(d) of the Internal Revenue Code. That section provided that when real estate seized consists of several distinct tracts or parcels of land, there shall be an offer of each tract or parcel for sale separately. The court stated that the purpose of this provision was to compel the sale of only so much land as may be necessary to satisfy the taxes. *Id.* at 114. The court stated that its conclusion was strengthened by the consideration of what was then § 3712 which held "when any property liable to distraint for taxes is not divisible, so as to enable the collector by sale of a part

thereof to raise the whole amount of the tax, with all costs and charges, the whole of such property shall be sold." The court held that in construing similar statutes the Supreme Court has declared:

> That when it does not affirmatively appear in a sale of the entire land that no one would bid the amount of the taxes and costs for less than the whole, or that the land was incapable of division, the sale is invalid. *Id.* at 115.

The court held that because the land was described as two separate tracts, it affirmatively appeared that the land was capable of division. *Id.* Therefore, because the land was capable of being divided, the rights of the debtor were prejudiced when the property was sold as a whole.

The court's discussion in *McAndrews* makes it clear that when the Internal Revenue Code is referring to "divisible", it is referring to the capability of the property to be divided into parcels and, therefore, the IRS properly sold the whole of Mr. Cooper's interest in the property.

CONCLUSION

The Internal Revenue Code clearly and unequivocally provides that the Internal Revenue Service can collect taxes owed to the United States by selling a delinquent taxpayer's interest in real estate by *either* one of

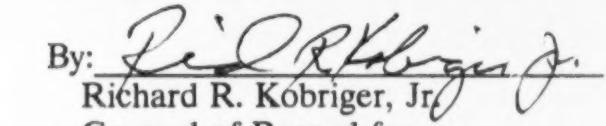
two methods: administrative seizure and sale or judicial foreclosure. Congress made no distinctions that there may be situations where *only* judicial foreclosure can be used. The only distinction is that if the IRS wants to foreclose a third party's right, title and interest in the property, it must be done by judicial foreclosure. However, if the IRS merely wants to sell the right, title, and interest of the delinquent taxpayer, without foreclosing the rights of third parties, it may do so by virtue of the administrative levy and sale procedures.

This case will give the Court the opportunity to determine whether the laws of any state can somehow preclude the United States from proceeding with the administrative seizure and sale procedures when no such exception exists in federal law. Resolving the issues presented will clarify the United States' ability to lay and collect taxes pursuant to Article XVI of the amendments to the United States Constitution without interference from state laws, either statutory or judicial, pursuant to the Supremacy Clause of Article VI of the Constitution. This Court has an opportunity to clearly establish that the Supremacy Clause is still potent in its application to delinquent taxpayers. While the Court may sympathize with the burden left to the respondent by her spouse, to allow

the decision of the Wisconsin Supreme Court to stand without review would leave unsettled an important question of federal law which has not been, but should be, settled by this Court.

For all of the foregoing reasons, it is respectfully requested that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,
CRAMER, MULTHAUF & HAMMES

By: 
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REPLY APPENDIX TABLE OF CONTENTS

	Page
Statement of Ursula Kordasiewicz-Wastian	101

No. 92-443

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1992

: : : : : : : : : : : : : : : : : : : :
JAMES M. ELFELT, et al, :
:
Petitioners, :
v. : Case No. _____
ALBINA COOPER, :
:
Respondent. :
: : : : : : : : : : : : : : : : : : : :

State of Wisconsin)
) ss.
County of Milwaukee)

I, Ursula Kordasiewicz-Wastian, duly state the following:

1. That I am the Chief of the Special Procedures Staff of the Milwaukee District of the Internal Revenue Service located in Milwaukee, Wisconsin.

2. In such capacity, I have the responsibility of overseeing the technical aspects of Internal Revenue Service collection matters including bankruptcies, civil litigation issues, judgements, offers in compromise and administrative seizures of property.

3. I have been asked to provide a statement as to the practices of the Milwaukee District office regarding the seizure of principal residences of taxpayers who have incurred federal tax liabilities and failed to satisfy same after notice and demand by the Internal Revenue Service.

4. In making this determination I have reviewed some records of the Internal Revenue Service relating to seizures and sales of principal residences, including homesteads, of taxpayers in the State of Wisconsin for the past several years.

5. Since the enactment of I.R.C. § 6334(a)(13) the Internal Revenue Service in Wisconsin has continued to use the administrative seizure and sale provisions of the Internal Revenue Code I.R.C. § 6331 through 39 to satisfy tax liabilities of taxpayers. The Service has administratively seized and sold jointly held principal residences and homesteads in Wisconsin on numerous occasions, with the written approval of the District Director or Assistant District Director of the Milwaukee District pursuant to I.R.C. § 6334(e), and intends to do so in the future.

CHIEF SPECIAL PROCEDURES

Date: Oct. 28, 1992 By:/s/Ursula Kordasiewicz-Wastian

Supreme Court, U.S.
FILED
JAN 13 1993

No. 92-143

In the Supreme Court of the United States

OCTOBER TERM, 1992

JAMES M. ELFELT, ET AL., PETITIONERS

v.

ALBINA COOPER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in order to collect delinquent federal income taxes, the United States may levy upon and sell the taxpayer's interest in joint tenancy homestead property in Wisconsin.

TABLE OF CONTENTS

	Page
Statutory provisions involved	1
Statement	1
Discussion	9
Conclusion	20
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Aquilino v. *United States*, 363 U.S. 509 (1960)	10
Blodgett, In re, 115 F. Supp. 33 (E.D. Wis. 1953)	19
Bradhaw, In re, 125 B.R. 782 (Bankr. E.D. Wis. 1991)	16
Clark, In re, 116 B.R. 672 (Bankr. W.D. Wis. 1989)	15
Elfelt v. *Cooper*:	
471 N.W.2d 303 (Wis. Ct. App. 1991)	5
485 N.W.2d 56 (Wis. 1992)	7
Glass City Bank v. *United States*, 326 U.S. 265 (1945)	10
Hazard, In re, 113 B.R. 494 (W.D. Wis. 1990)	16
Herndon v. *United States*, 501 F.2d 1219 (8th Cir. 1974)	18
Howe, In re, 20 B.R. 938 (Bankr. W.D. Wis. 1982)	15, 16
Nelson v. *Albrechtson*, 287 N.W.2d 811 (Wis. 1980)	14
Nichols v. *Nichols*, 168 N.W.2d 876 (Wis. 1969)	6, 14
Phillips v. *Commissioner*, 283 U.S. 589 (1931)	12
Radtke v. *Radtke*, 19 N.W.2d 169 (Wis. 1945)	14
Schapiro v. *Security Savings & Loan Ass'n*, 441 N.W.2d 241 (Wis. Ct. App. 1989)	14, 15
State Bank of Drummond v. *Christophersen*, 286 N.W.2d 547 (Wis. 1980)	15
United States v. *Bess*, 357 U.S. 51 (1958)	10

Cases—Continued: Page

United States v. *Hoffman*, 643 F. Supp. 346 (E.D. Wis. 1986) 6, 19
United States v. *Mitchell*, 403 U.S. 190 (1971) 10, 12
United States v. *National Bank of Commerce*, 472 U.S. 713 (1985) 5, 11, 12, 13, 17
United States v. *Rodgers*, 461 U.S. 677 (1983) 4, 10, 11, 17
United States v. *Union Central Life Ins. Co.*, 368 U.S. 291 (1961) 10

Statutes and regulations:

Internal Revenue Code (26 U.S.C.):
§ 6321 ..... 1, 2, 5, 9
§ 6322 10
§ 6323(f) 3
§ 6331 ..... 1, 3, 6, 7, 9, 11, 13, 16
§ 6331(a) 11
§ 6331(b) 12
§§ 6331-6339 16
§ 6334 ..... 1, 12, 17
§ 6334(a) 11
§ 6334(a)(13) 12
§ 6334(c) 11
§ 6334(e)(1) 12
§ 6335 ..... 1, 3, 6, 11, 12, 13, 17
§ 6335(c) 7
§ 6337 1
§ 6337(b) 3
§ 6338 1
§ 6339 ..... 1, 3, 18
§ 6339(b)(2) 3, 13, 17, 18
§ 6342 17
§ 6342(b) 3
§ 6343 1
§ 6343(b) 3, 13
§ 6502(a) 11
§ 7401 11
§ 7402 ..... 1, 11
§ 7403 ..... 1, 9, 10, 11, 19
§ 7426 13

Statutes and regulations—Continued: Page

§ 7426(a) 3
§ 7426(h) 3
Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342:
§ 6236(c)(4)(A), 102 Stat. 3738-3739 12
§ 6236(c)(4)(B), 102 Stat. 3739 12
Wis. Stat. Ann. (West 1981 & Supp. 1992):
§ 71.10(6)(a) 15
§ 71.10(6)(b) 15
§ 71.91(3) 15
§ 700.17(2) (Supp. 1992) 2
§ 700.17(2)(a) (Supp. 1992) 1, 2, 5, 14
§ 700.17(3) 2
§ 700.19(2) (1981 & Supp. 1992) 2
§ 700.23(3) 4, 1a
§ 700.23(3)(a) 4
§ 700.24 (Supp. 1992) 14, 15
§ 706.01(1) 15, 1a
§ 706.01(2)(a) 15, 1a
§ 706.01(7) 14
§ 706.02(1) 15, 1a
§ 706.02(1)(f) 2, 6, 8, 15
§ 766.31(1) (Supp. 1992) 16
§ 766.31(8) (Supp. 1992) 16
§ 766.55(2)(d) (Supp. 1992) 15
§ 815.20(1) (Supp. 1992) 2, 6, 15, 16, 2a
§ 842.02 ..... 4, 6
§ 842.14 4
§ 990.01(13)(a) 2, 14, 3a
§ 990.01(14) (Supp. 1992) 15, 3a
26 C.F.R.:
Section 301.6321-1 10
Section 301.6334-1(c) 1, 12

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-443

JAMES M. ELFELT, ET AL., PETITIONERS

v.

ALBINA COOPER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Sections 6321, 6331, 6334, 6335, 6337, 6338, 6339, 6343, 7402 and 7403 of the Internal Revenue Code (26 U.S.C.) are set forth at Pet. App. 147-163. The pertinent provisions of Section 301.6334-1(c) of the Treasury Regulations on Procedure and Administration (26 C.F.R.) and of Wis. Stat. Ann. § 700.17(2)(a) (West Supp. 1992) are set forth at Pet. 4. Other pertinent provisions are set forth at App., *infra*, 1a-3a.

STATEMENT

1. In 1963, respondent Albina Cooper and her husband, Dale Cooper, purchased a tract of land in Dousman, Wisconsin, as joint tenants. Under Wisconsin law,

"[e]ach of 2 or more joint tenants has an equal interest in the whole property," with a right of survivorship such that, upon the death of the other, "the survivor becomes the sole owner" (Wis. Stat. Ann. § 700.17(2)(a) (West Supp. 1992) (Wis. Stat.).[1] In 1969, the Coopers built a house on that property and thereafter used the house as their residence (Pet. App. 103-104). As their residence, the property constituted their "homestead" under Wisconsin law (Wis. Stat. § 990.01(13)(a) (1981)). As their "homestead," the property could not voluntarily be conveyed or alienated by either spouse without the consent of the other (*id.* § 706.02(1)(f)). "Homestead" property in Wisconsin is also generally entitled to an exemption (in the amount of $40,000) from execution by certain types of creditors (*id.* § 815.20(1) (Supp. 1992)).[2] This limited state-law "homestead" exemption is specifically *not* applicable to debts for "taxes" (*ibid.*).

Dale Cooper failed to pay the federal income taxes that he owed for 1982 (Pet. App. 104). Under Section 6321 of the Internal Revenue Code, a lien for the amount of the unpaid taxes attached to "all property and rights to property, whether real or personal, belonging to" Dale Cooper (26 U.S.C. 6321) and therefore attached to Mr. Cooper's undivided interest in the joint tenancy property (Pet. App. 118, 124-126). Since respondent was not personally liable for her husband's tax obligations, however, the federal lien did not attach to any interest she owned in that property (Pet. App. 104).

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[1] Under Wisconsin law, a married couple may freely choose whether to own property as joint tenants or as tenants in common. See Wis. Stat. § 700.19(2) (1981 & Supp. 1992). A joint tenancy differs from a tenancy in common in that the former includes a right of survivorship and the latter does not. Compare Wis. Stat. § 700.17(2) (Supp. 1992) with *id.* § 700.17(3).

[2] The "homestead" exemption under Wisconsin law applies whether the married couple owns the property as tenants in common or as joint tenants. Wis. Stat. § 815.20(1) (Supp. 1992).

The IRS issued notice of the federal tax lien on Mr. Cooper's property (26 U.S.C. 6323(f)) and, upon Mr. Cooper's failure to pay the delinquent taxes, levied upon and sold his interest in the joint tenancy property pursuant to 26 U.S.C. 6331 and 6335. Mr. Cooper's interest in the property was sold by the IRS to John and Stacey Elfelt at a tax sale conducted on June 25, 1986 (Pet. App. 104).

Following the tax sale, neither respondent nor Mr. Cooper exercised their statutory right to redeem the property by payment of the outstanding taxes and interest (26 U.S.C. 6337(b)).[3] Respondent also failed to pursue the administrative and judicial remedies provided by Sections 6343(b) and 7426(a) of the Internal Revenue Code for asserting any challenges to the levy and sale of the taxpayer's property (Pet. App. 111).[4] After the period for redemption and for challenging the tax levy and sale expired (see note 4, *supra*), the Elfelts received a deed from the United States that, pursuant to Section 6339 of the Code, "operate[d] as a conveyance of all the right, title, and interest [Mr. Cooper] had in and to the real property" (26 U.S.C. 6339(b)(2)). The Elfelts subsequently transferred the interest deeded to them by the

[3] To redeem the property, the taxpayer (or any other person with an interest in the property) may tender the purchase price, along with statutory interest, to the tax sale purchaser within 180 days of the sale. 26 U.S.C. 6337(b). If the purchase price exceeded the costs of the sale and the delinquent tax liability, the IRS will credit or refund the excess "to the person or persons legally entitled thereto" (26 U.S.C. 6342(b)). The ultimate cost of redemption to the taxpayer is thus the sale price of the property (plus interest) or the amount of the taxes owed (plus the costs of the sale and interest), whichever is less.

[4] These statutes authorize the IRS and the federal district courts to set aside an unlawful levy or sale. The statute of limitations for these federal remedies, however, is only nine months (26 U.S.C. 6343(b), 7426(h)), reflecting the need for prompt finality of the title passed by the United States through such sales.

United States to their sons. The Elfelts' sons are the petitioners in this case (Pet. App. 104, 141-142).

2. Petitioners made demand of Albina Cooper under Wis. Stat. § 700.23(3) for an apportioned share of the reasonable rental value of the property for the period of her continued, exclusive occupancy.[5] When respondent refused that demand, petitioners brought suit in Wisconsin state court to partition the property and for rent during the period that respondent adversely maintained exclusive possession of the premises (Pet. App. 105, 140). Approximately one year after the partition action was filed, but before the case was tried, Mr. Cooper died (*id.* at 105-106).[6]

At trial, petitioners asserted that they held valid title to Mr. Cooper's interest in the property through the deed conveyed by the United States at the tax sale. Respondent claimed, however, that petitioners acquired no valid

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[5] Wis. Stat. § 700.23(3)(a) authorizes a cotenant to receive a "proportionate share of the reasonable rental value of the land accruing after written demand for rent if the occupying tenant manifests his intent to occupy the premises to the exclusion of the other cotenant or cotenants."

[6] None of the courts below considered or discussed whether the death of Mr. Cooper *before* the decree in partition was entered mooted the partition case by vesting title to the property in Mrs. Cooper in fee simple by virtue of her right of survivorship. It is possible that the partition decree would be deemed retroactive to the filing date of the partition action, but we have found no Wisconsin decisions addressing this issue. If the partition decree were deemed retroactive, the allocation of the partition sale proceeds *could* compensate Mrs. Cooper for the loss of her right of survivorship, based on the relative life expectancies of the Coopers on the date the suit was filed. See *United States* v. *Rodgers*, 461 U.S. 677, 680, 694 (1983). Whether the partition decree under Wisconsin law would make such an equitable allocation of the sale proceeds (see Wis. Stat. §§ 842.02, 842.14) was not addressed by any of the courts below.

Even if the partition request was mooted by Mr. Cooper's death, petitioners' additional request for an apportioned rent under Wisconsin law for the period between the tax sale and Mr. Cooper's death would not be moot.

interest in the property from the United States because (i) the United States lacked legal authority to levy upon and sell Mr. Cooper's interest in the property and (ii) the IRS failed to follow the procedures mandated by the Internal Revenue Code for conducting such an administrative sale (Pet. App. 105-106).

An advisory jury found that the IRS had complied with the required statutory procedures in conducting the seizure and sale of Mr. Cooper's interest in the property (Pet. App. 106, 140). The trial court then ruled that Mr. Cooper's interest in the property had been validly seized and sold by the United States to petitioners. The court directed respondent to pay an apportioned rent to petitioners for the period of her exclusive occupancy of the premises (see note 5, *supra*) and ordered the property to be partitioned by a sale conducted under Wisconsin law (Pet. App. 106, 143-145).

3. The Wisconsin court of appeals affirmed (Pet. App. 120-139). *Elfelt* v. *Cooper*, 471 N.W.2d 303 (1991). The court stated that the critical issue is whether the Internal Revenue Code authorizes the United States to levy upon and sell a taxpayer's interest in joint tenancy homestead property to satisfy his individual tax liability (Pet. App. 123). The court of appeals noted that this Court has held that the federal tax lien—which attaches to "all property and rights to property" belonging to a delinquent taxpayer (26 U.S.C. 6321)—is extremely broad and is designed "to reach every interest in property that a taxpayer may have" (Pet. App. 124, citing *United States* v. *National Bank of Commerce*, 472 U.S. 713, 719-720 (1985)). The court concluded that a joint tenant, who owns "an equal interest in the whole property for the duration of the tenancy" (Pet. App. 126, citing Wis. Stat. § 700.17(2)(a) (Supp. 1992)), necessarily has a "property" interest in "the whole property" under Wisconsin law. "Joint tenants have the right to sell their shares or seek and obtain partition" (Pet. App. 126, cit-

ing Wis. Stat. § 842.02; *Nichols* v. *Nichols*, 168 N.W.2d 876, 878 (Wis. 1969)). Since the joint tenancy interest is a "property" interest, it is subject to the federal tax lien (Pet. App. 127).

The court then considered what effect, if any, should be given to the fact that the Coopers' property was used as their residence and thus constituted their "homestead" under Wisconsin law (Pet. App. 127). The court noted that there are two consequences of the "homestead" designation of property in Wisconsin: (i) a voluntary conveyance or alienation "of a property interest existing as a homestead * * * must contain both spouses' signatures" (*ibid.*, citing Wis. Stat. § 706.02(1)(f)); and (ii) an interest in "homestead" property is generally entitled to a limited exemption (in the amount of $40,000, see Wis. Stat. § 815.20(1) (Supp. 1992)) from execution by certain types of creditors (Pet. App. 127). The court held (*ibid.*) that the State's formal "signature requirement" for consensual conveyances of "homestead" property "is inoperative * * * [to] prevent" the nonconsensual levy and sale of that property pursuant to 26 U.S.C. 6331, 6335. "Furthermore, it has been held that state homestead exemptions do not prevent the IRS from levying" on a delinquent taxpayer's interest in such property (Pet. App. 127, citing *United States* v. *Hoffman*, 643 F. Supp. 346, 349 (E.D. Wis. 1986)).

Because Mr. Cooper had an interest in the property to which the federal lien attached, the court of appeals concluded that the Internal Revenue Code (and not state law) determines the procedures that the United States may pursue to collect the acknowledged tax debt of Mr. Cooper. The court noted that the administrative levy and sale of the taxpayer's interest in property were explicitly authorized by Section 6331 of the Code (Pet. App. 128-130).[7] Because the United States validly seized and sold

[7] The court of appeals rejected respondent's further contention that the levy and sale of Mr. Cooper's interest in the property were

Mr. Cooper's interest in the property, petitioners were entitled, under Wisconsin law, to partition the property and to obtain an apportioned, interim rent for the period of respondent's exclusive possession of the premises (Pet. App. 133).

4. The Supreme Court of Wisconsin reversed (Pet. App. 101-119). *Elfelt* v. *Cooper*, 485 N.W.2d 56 (1992). The court held that, absent respondent's consent to the sale, the United States lacks authority to seize and sell Mr. Cooper's interest in the joint tenancy homestead property to collect his delinquent tax obligation.[8]

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unconstitutional because Section 6331 does not require that a spouse be given notice of the sale of her husband's interest. The court observed that the only interest subject to the levy and sale was the *taxpayer's* interest; the sale did not purport to transfer or otherwise affect respondent's separate interest in the property. Because respondent had "the same interest after the sale that she did before the sale" (Pet. App. 131), the court concluded there was no requirement that she be given notice of the sale. See also note 6, *supra*.

The court of appeals also rejected respondent's claim that the homestead interest was an "indivisible" interest under state law and that only the *entire* property may be sold for the sale to be effective. The court noted that a homestead property *is* divisible under Wisconsin law, for the joint tenants' interest may be partitioned (Pet. App. 126), may be judicially foreclosed (*id.* at 131), and may be conveyed voluntarily with the consent of both spouses (*id.* at 132).

[8] Having concluded that the IRS lacked authority to seize and sell Mr. Cooper's interest in the homestead property, the court stated that it would not consider, and did not reach, respondent's argument that "the property was indivisible and that therefore the IRS should have sold the entire homestead, not just Mr. Cooper's interest" under 26 U.S.C. 6335(c) (Pet. App. 111 n.3). For the same reason, the court declined to consider respondent's contention that the levy and sale of her husband's interest in the property violated due process by failing to give her notice of the sale (*ibid.*). The court did state, however, that, if the effect of the levy and sale was to eliminate respondent's right of survivorship by converting the joint tenancy into a tenacy in common, "serious constitutional doubt" would arise as to whether notice to respondent of the sale was required (*ibid.*). But see note 6, *supra*.

The court emphasized that, under Wisconsin law, no interest in homestead property held by spouses in joint tenancy could be voluntarily conveyed or alienated by one spouse without the consent of the other: "[I]t is absolutely inalienable without the consent of both spouses and is therefore worthless to one spouse acting alone without the consent of the other" (Pet. App. 116; see *id.* at 115 n.4, quoting Wis. Stat. § 706.02(1)(f)).[9] While the court recognized that a joint tenant's interest in homestead property could be the subject of *non*consensual judicial execution procedures to seize and sell the property, the court emphasized that the IRS had not proceeded judicially in this case (Pet. App. 118):

> As Mr. Cooper would not be able to convey any interest of the jointly held spousal homestead without Mrs. Cooper's consent, the IRS, which merely steps into Mr. Cooper's shoes, also cannot convey any interest of the jointly held spousal homestead without either Mrs. Cooper's consent or court action. Due to the nature of Mr. Cooper's property interest under Wisconsin law, any conveyance of that interest by the IRS without Mrs. Cooper's consent and without court action is ineffective. Consequently, the Elfelts did not obtain and do not now own an interest in Mrs. Cooper's homestead.

The court did not doubt that "if the IRS had * * * brought a lien foreclosure action in district court, the IRS might validly have conveyed an interest in the Coopers' jointly held spousal homestead" (Pet. App. 118). According to the court, the fatal problem for petitioners was that the State's conveyancing statutes required the wife's consent to any nonjudicial conveyance of the hus-

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[9] The court stated that the joint tenancy interest in homestead property was "indivisible by one spouse without the consent of the other" because, under the State's conveyancing statute (Wis. Stat. § 706.02(1)(f)), "it is absolutely inalienable without the consent of both spouses" (Pet. App. 115-116).

band's interest in the property: Since the wife did not consent, the court concluded that the conveyance of the property by the United States was ineffective (*ibid.*). Concluding that the United States did not validly convey any interest in the property, the court held that respondent became the sole owner of the property upon Mr. Cooper's death "under her right of survivorship" (Pet. App. 119).

DISCUSSION

The Supreme Court of Wisconsin has acknowledged that the property interest that a joint tenant owns in his residence in Wisconsin is subject to the federal lien created by Section 6321 of the Internal Revenue Code for the collection of delinquent taxes. The court held, however, that that property interest may not be administratively sold and conveyed by the United States, under Section 6331 of the Code, without the consent of the joint tenant's spouse.

We do not agree with the court's reasoning or its conclusion. But the decision in this case purports to be based on the particular features of the State's conveyancing laws and does not directly conflict with any decision of this Court. Moreover, the court conceded that, even without the consent of the spouse, the United States may judicially foreclose such joint tenancy interests in homestead property under 26 U.S.C. 7403. Since, even in Wisconsin, the United States may thus recover delinquent taxes by that alternative method, the question presented in this case is not clearly of sufficient, recurring importance to warrant further review.

1. a. If any person liable for federal taxes neglects or refuses to pay them after assessment, notice and demand, the amount of the unpaid taxes "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. 6321. The lien reaches both tangible and in-

tangible property and extends to property that is both currently existing and later acquired. See 26 C.F.R. 301.6321-1. The lien arises at the time the assessment is made and continues until the liability is satisfied or becomes unenforceable by reason of lapse of time. 26 U.S.C. 6322. It is evident from the language of these statutes that the tax lien is broadly designed to reach every interest in property owned by the delinquent taxpayer. "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945).

Attachment of the federal tax lien depends on whether "property" or "rights to property" exist under state law, and the fundamental definition of the underlying property interest is left to state law. *Aquilino* v. *United States*, 363 U.S. 509, 512-515 (1960); *United States* v. *Bess*, 357 U.S. 51, 55-56 (1958). Once it is determined that state law has created a "property" interest, however, state law is inoperative to prevent the consequences of the attachment of the federal lien. See *United States* v. *Rodgers*, 461 U.S. at 700-702 (state-created exemption against forced sale of homestead is not effective to prevent action to foreclose the federal tax lien under 26 U.S.C. 7403); *United States* v. *Bess*, 357 U.S. at 56-57 (state law shielding insured's interest in cash surrender value of insurance policy from private creditors did not shield interest from operation of federal tax lien). See also *United States* v. *Mitchell*, 403 U.S. 190, 205 (1971); *United States* v. *Union Central Life Ins. Co.*, 368 U.S. 291, 293-295 (1961). The consequences of the attachment of a federal tax lien to particular property are matters solely of federal law.

Once a valid lien for delinquent taxes has arisen, Congress has conferred broad powers on the Secretary of the Treasury to take affirmative action to enforce collection against property of the taxpayer. The Internal

Revenue Code creates several distinct collection alternatives. The government may sue to reduce its assessment to judgment and, on obtaining a judgment, exercise the rights of a judgment creditor. 26 U.S.C. 6502(a), 7401, 7402. The government may institute a foreclosure action in federal district court to enforce its lien against property in which the taxpayer has an interest. 26 U.S.C. 7403. A foreclosure is not limited to the sale of the taxpayer's own interest in the property; instead, the entire property in which the United States has a claim by virtue of its federal tax lien may be sold in foreclosure. See *United States* v. *Rodgers*, 461 U.S. at 680. The interests of third parties in the property sold at foreclosure are compensated out of the proceeds of the sale. *Id.* at 680, 694. The government may thus force a sale of property interests *other* than those of the delinquent taxpayer in order to realize the highest return possible on the property that is subject to the federal tax lien. *Id.* at 699. The result of judicial foreclosure is that all rights and claims of all parties to the property are resolved and clear title to the property passes to the purchaser.

Alternatively, as occurred in this case, the government may find it appropriate to proceed administratively, without judicial intervention, to levy upon and sell a delinquent taxpayer's interest in a property. 26 U.S.C. 6331, 6335. See *United States* v. *National Bank of Commerce*, 472 U.S. at 720-721. Section 6331(a) provides that, if any person liable for tax neglects to pay the same after notice and demand, "it shall be lawful for the Secretary to collect such tax * * * by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax." Section 6334(a) sets forth the specific property interests that are exempt from levy as a matter of federal law. Section 6334(c) emphasizes that "[n]otwithstanding any other law of the United States * * *

no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." See *United States* v. *Mitchell*, 403 U.S. at 205. Because homestead property is not exempt from the federal levy,[10] Treasury regulations thus provide that "property exempt from execution under State personal or homestead exemption laws is, nevertheless, subject to levy by the United States for collection of its taxes." 26 C.F.R. 301.6334-1(c).

In any case where the IRS is authorized to proceed by levy, it may seize and sell the property in accordance with the procedures set forth in Section 6335. 26 U.S.C. 6331(b). The administrative levy has been described as a provisional remedy. In contrast to the lien foreclosure suit, a levy affects only the taxpayer's interest in a property. *United States* v. *National Bank of Commerce*, 472 U.S. at 727. The underlying rationale of the administrative levy is "the need of the government promptly to secure its revenues." *Id.* at 721 (quoting *Phillips* v. *Commisioner*, 283 U.S. 589, 596 (1931)). As this Court has observed, the levy power is essential to our self-assessment system of taxation, for it provides a quick and

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[10] When the taxpayer's interest in the property involved in this case was levied upon and sold, Section 6334 contained no exemption from levy for homestead interests. In 1988, the Code was amended to create a limited exemption from levy for the "principal residence" of the taxpayer for levies issued on or after July 1, 1989. See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6236(c)(4)(A), 102 Stat. 3738-3739 (26 U.S.C. 6334(a)(13)). That exemption is inapplicable, however, if "a district director or assistant district director of the Internal Revenue Service personally approves (in writing) the levy." Pub. L. No. 100-647, § 6236(c)(4)(B), 102 Stat. 3739 (26 U.S.C. 6334(e)(1)). Consequently, homesteads remain subject to the administrative collection process. Contrary to respondent's suggestion (Br. in Opp. 6-8), the limited exemption provided by Section 6334(a)(13) will not prevent the issue presented by this case from recurring in the future because the statute continues to afford the IRS discretion to proceed against a homestead by administrative means.

relatively inexpensive method of tax collection that enhances voluntary taxpayer compliance. 472 U.S. at 721.

The administrative levy does not finally determine or establish rights of competing claimants in the property subject to seizure. Those rights must be resolved in subsequent judicial proceedings that are ordinarily conducted in state courts. See 472 U.S. at 731. The administrative sale does not purport to convey clear title to property; instead, it conveys "all the right, title, and interest the [delinquent taxpayer] had in and to the real property" (26 U.S.C. 6339(b)(2)). The value that can be realized by the government from the levy is, as a consequence, often less than would be realized in a foreclosure action. But the levy and sale procedure results in a prompt receipt of delinquent tax funds and makes it unnecessary for the United States to participate in the sometimes protracted and expensive process of judicial foreclosure.

Third parties who possess interests or claims to levied property may, as in the present case, obtain a determination of their rights to the property in a quiet title action. In addition, Section 7426 of the Code authorizes anyone claiming an interest in such property to bring a civil action against the United States to have the property or the proceeds of its sale returned, while Section 6343(b) of the Code provides an administrative method for the return of property that has been wrongfully levied.

b. In this case, acting pursuant to Sections 6331 and 6335 of the Code, the IRS levied upon and sold the interest that the delinquent taxpayer possessed in property located in Dousman, Wisconsin. The property at issue had been owned by taxpayer and respondent in joint tenancy and used as their residence. Accordingly, it was their "homestead" within the meaning of Wisconsin law, which defines the "homestead" as "the dwelling, and so much of the land surrounding it as is reasonably necessary for use of the dwelling as a home, but not less than one-

fourth acre * * * and not exceeding 40 acres." Wis. Stat. §§ 706.01(7), 990.01(13)(a). As a "homestead," the property's voluntary alienation was restricted, and its availability to creditors was limited. But, as the Wisconsin courts have held, the laws restricting the alienation of homestead interests and exempting the homestead from execution are not intended to create new property rights or to alter the nature of the property interest held by either spouse.[11] See *Radtke* v. *Radtke*, 19 N.W.2d 169, 170 (Wis. 1945); *Schapiro* v. *Security Savings & Loan Ass'n*, 441 N.W.2d 241, 244 (Wis. Ct. App. 1989). Because respondent and taxpayer held the property in joint tenancy, each possessed "an equal interest in the whole property for the duration of the tenancy," and, "[o]n the death of one * * *, the survivor becomes the sole owner" (Wis. Stat. § 700.17(2)(a) (Supp. 1992)). Each joint tenant's interest in the property may be encumbered by private security interests as well as statutory liens, including liens for unpaid income taxes. Upon the death of a joint tenant whose interest is so encumbered, the survivor takes the decedent's interest subject to those liens. *Id.* § 700.24 (Supp. 1992).[12] A joint tenant may alienate his interest in the property and unilaterally sever the tenancy. See, *e.g.*, *Nelson* v. *Albrechtson*, 287 N.W.2d 811, 817 (Wis. 1980); *Nichols* v. *Nichols*, 168 N.W.2d 876, 878 (Wis. 1969).

The homestead of a married couple, however, whether held in joint tenancy, in a tenancy in common, or solely by one spouse, is protected for the duration of the mar-

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[11] Because homestead rights are not estates, a spouse has the power to abandon the property as a homestead and thereby defeat the other spouse's right to veto a sale of the homestead. See *Radtke* v. *Radtke*, 19 N.W.2d 169, 170 (Wis. 1945).

[12] The statutory liens identified in Section 700.24 include liens for unpaid income and franchise taxes, gift taxes, public assistance payments, and construction and mechanics liens.

riage against the voluntary transfer or conveyance of any interest in the property by one spouse, unless the consent of the other spouse is obtained. Wis. Stat. § 706.02(1)(f). A voluntary conveyance that does not have the signature of both spouses is thus invalid. See, *e.g.*, *In re Howe*, 20 B.R. 938, 942-943 (Bankr. W.D. Wis. 1982); *State Bank of Drummond* v. *Christophersen*, 286 NW.2d 547, 551 (Wis. 1980); *Schapiro* v. *Security Savings & Loan Ass'n*, 441 N.W.2d at 244.

This restriction on transfer of the homestead, however, applies only to *voluntary* conveyances. It has no application to transactions whereby an interest in land is affected "[b]y act or operation of law." Wis. Stat. § 706.01(2)(a)(1981). See also *id.* §§ 706.01(1), 706.02(1)(1981). Thus, Section 706.02(1)(f) does not protect the homestead from the operation and effect of statutorily arising liens. See *id.* § 700.24 (Supp. 1992). Moreover, Section 706.02(1)(f) does not establish the extent to which the homestead is protected from the reach of either private or governmental creditors. These protections are separately set forth in Section 815.20(1), which exempts the homestead from execution, from judgment liens, and from liability for the debts of the owner to the extent of $40,000. See *In re Clark*, 116 B.R. 672 (Bankr. W.D. Wis. 1989).[13] The limitations of Section 815.20(1), however, expressly do not apply to "tax" debts or to other liens arising by operation of law.[14] See Wis. Stat.

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[13] See also Wis. Stat. § 990.01(14) (Supp. 1992) (defining "exempt homestead" as "the dwelling * * * and so much of the land surrounding it as is reasonably necessary for its use as a home * * * within the limitation as to value * * * under s. 815.20").

[14] Wisconsin's income tax collection statutes now protect "marital property" from collection of tax debts that are solely the responsibility of one spouse. Collection in those circumstances is limited to nonmarital property or to setoffs. See Wis. Stat. §§ 71.91(3), 71.10(6)(a) and (b) (1981), 766.55(2)(d) (Supp. 1992). The definition of marital property is set forth in the enactments governing marital

§ 815.20(1) (Supp. 1992); *In re Hazard*, 113 B.R. 494, 497 (W.D. Wis. 1990).

Thus, although Wisconsin law places restrictions on the voluntary alienation of a homestead, the homestead is not beyond the reach of liens or of execution upon those liens. Moreover, the restrictions on execution that exist under Wisconsin law are not applicable to liens arising by operation of law, including tax liens. Wis. Stat. § 815.20(1) (Supp. 1992). See *In re Bradshaw*, 125 B.R. 782, 784 (Bankr. E.D. Wis. 1991); *In re Howe*, 20 B.R. 938, 942 (Bankr. W.D. Wis. 1982).

2. Against this background, the Supreme Court of Wisconsin recognized that the tax lien of the United States properly attached to the taxpayer's interest in the joint tenancy homestead property, but the court held that the United States could not voluntarily transfer that interest—except though judicial foreclosure proceedings—without the consent of the taxpayer's spouse. The court reasoned that the United States "merely steps into [the] shoes" of the taxpayer and, since the taxpayer "cannot convey any interest of the jointly held spousal homestead without either Mrs. Cooper's consent or court action," neither could the United States (Pet. App. 118).

The court's analysis misapprehends the respective roles of state and federal law in the collection of federal taxes and overlooks the specific provisons of Sections 6331 through 6339 of the Internal Revenue Code.

a. The Supreme Court of Wisconsin correctly acknowledged that a joint tenant's interest in a homestead in Wisconsin is a "property" interest to which the federal tax lien may attach. Section 6331 of the Internal Revenue

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property rights, which became effective on January 1, 1986. The enactment of these laws was not intended to affect the classification of property acquired prior to that date. *Id.* § 766.31(8) (Supp. 1992). Apart from previously acquired property and property otherwise defined, all property of spouses is now presumed to be marital property. *Id.* § 766.31(1) (Supp. 1992).

Code expressly authorizes the United States to seize such interests in "property" from a delinquent taxpayer "by levy." And, since such property is *not* exempt from levy under Section 6334 of the Code (see page 12 & note 10, *supra*), Section 6335 of the Code authorizes the IRS to sell the taxpayer's interest in the property. Section 6342 of the Code then directs that the sale proceeds, less the costs of the sale, be applied toward satisfaction of the delinquent tax liability. After the sale occurs, in the absence of redemption of the property, the United States is to issue a deed to the purchaser that, by direction of federal law, "shall be considered and operate as a conveyance of all the right, title, and interest the [delinquent taxpayer] had in and to the real property" (26 U.S.C. 6339(b)(2)).

The consensual conveyancing requirements for such property under Wisconsin law are preempted by this federal statutory scheme. As this Court stated in *United States* v. *National Bank of Commerce*, 472 U.S. at 722:

> [T]he federal statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States* v. *Bess*, 357 U.S. 51, 55 (1958). And those consequences are "a matter left to federal law." *United States* v. *Rodgers*, 461 U.S., at 683. "[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative," and the tax consequences thenceforth are dictated by federal law.

In *United States* v. *Rodgers*, the Court similarly emphasized that "it has long been an axiom of our tax collection scheme that, although the definition of underlying property interests is left to state law, the consequences that attach to those interests is a matter left to federal law." 461 U.S. at 683.

The manner by which the United States conveys an interest in property seized from a delinquent taxpayer is thus a matter of federal law. State conveyancing rules cannot dictate requirements contrary to the express provisions of Section 6339, which authorizes the United States, after levy and sale, to issue a "deed [that] *shall be considered and operate as a conveyance* of all the right, title, and interest" the delinquent taxpayer possessed in the property (26 U.S.C. 6339(b)(2) (emphasis added)). The fact that the State would—in the absence of the consent of the spouse—require judicial foreclosure to convey such an interest does not preclude Congress from authorizing the United States to elect the simpler, quicker, and less expensive route of administrative levy and sale.

b. In *Herndon* v. *United States*, 501 F.2d 1219 (1974), the Eighth Circuit held that the United States could administratively levy and sell the delinquent taxpayer's interest in homestead property notwithstanding the homestead rights of the taxpayer's spouse under Arkansas law. The court emphasized that (*id.* at 1223):

> The Government here is only claiming the right to sell [the delinquent taxpayer's] "right, title, and interest in the instant property, leaving any purported interest held by [the taxpayer's spouse] unimpaired."

While the buyer at the tax sale may take the taxpayer's interest "subject to [the spouse's] homestead rights," that does not alter the provisions of federal law that authorize the United States to levy and sell, and then convey, the interest that the delinquent taxpayer owns in the property. *Id.* at 1223.

The *Herndon* decision arose under Arkansas law and thus did not consider Wisconsin's conveyancing statute, which was relied upon by the Supreme Court of Wisconsin in this case. The *Herndon* decision thus cannot be

said to conflict directly with the decision below. But the analysis applied in *Herndon*, and by this Court in *National Bank of Commerce* and *Rodgers*, is squarely at odds with the reasoning adopted by the court in this case.

c. The decision in this case acknowledges the right of the United States, under Section 7403 of the Internal Revenue Code, judicially to foreclose its lien on joint tenancy homestead property (Pet. App. 118). Prior to the decision below, a federal district court in Wisconsin also had held that the United States could foreclose its tax lien against Wisconsin homestead property, even though only one spouse was liable for the tax. *United States* v. *Hoffman*, 643 F. Supp. 346 (E.D. Wis. 1986). And, in *In re Blodgett*, 115 F. Supp. 33 (E.D. Wis. 1953), the court further concluded that the nonliable spouse "could be compelled to accept a money satisfaction for her interest in [the property]" (*id.* at 35). See also note 6, *supra*.

Since the United States will be able, even in Wisconsin, to assert its lien against, and foreclose upon, joint tenancy homestead property when necessary for the collection of taxes, the decision in this case is not expected to create a significant, recurring obstacle to the enforcement of federal tax obligations. If, in the future, the decision in this case is adopted and applied in other jurisdictions, further review by this Court may then be warranted.

CONCLUSION

The decision below is not correct, but the question presented is not clearly of such substantial, recurring importance as to warrant further review at this time.

Respectfully submitted.

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STATUTORY APPENDIX

1. Wis. Stat. Ann. § 700.23(3) (West 1981) provides, in relevant part:

> If land belonging to such cotenants is occupied by one cotenant and not by another, any cotenant not occupying the premises may recover from the occupying cotenant:
>
> (a) A proportionate share of the reasonable rental value of the land accruing after written demand for rent if the occupying tenant manifests his intent to occupy the premises to the exclusion of the other cotenant or cotenants;
>
> * * * * *

2. Wis. Stat. Ann. § 706.01 (West 1981) provides, in relevant part:

> (1) Subject to the exclusions in sub. (2), this chapter shall govern every transaction by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity.
>
> (2) Excluded from the operation of this chapter are transactions which an interest in land is affected:
>
> (a) By act or operation of law;
>
> * * * * *

3. Wis. Stat. Ann. § 706.02(1) (West 1981) provides, in relevant part:

> Transactions under s. 706.01(1) shall not be valid unless evidenced by a conveyance which:
>
> (a) Identifies the parties; and
>
> (b) Identifies the land; and
>
> (c) Identifies the interest conveyed * * *; and

(d) Is signed by or on behalf of each of the grantors; and

(e) Is signed by or on behalf of all parties, if a lease or contract to convey; and

(f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead * * * except conveyances between spouses, but on a purchase money mortgage pledging that property as security only the purchaser need sign the mortgage; and

(g) Is delivered. * * *

4. Wis. Stat. Ann. § 815.20(1) (West Supp. 1992) provides:

> An exempt homestead as defined in s. 990.01(14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. * * * The exemption extends to land owned by husband and wife jointly or in common or as marital property, and when they reside in the same household may be claimed by either or may be divided in any proportion between them, but the exemption may not exceed $40,000 for the household. If the husband and wife fail to agree on the division of exemption, the exemption shall be divided between them by the court in which the first judgment was taken. * * *

5. Wis. Stat. Ann. § 990.01(13)(a) (West 1981) provides:

> The word "homestead" means the dwelling and so much of the land surrounding it as is reasonably necessary for use of the dwelling as a home, but not less than one-fourth acre (if available) and not exceeding 40 acres.

6. Wis. Stat. Ann. § 990.01(14) (West 1981) provides:

> The words "exempt homestead" mean that part of the homestead within the limitation as to value set forth in s. 815.20 * * *.

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